Supreme Court, U.S.
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91-2073

No. 91-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHNNIE WALKER,

Petitioner,

v

FRITO-LAY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHNIE A. McLEOD*
McLEOD, McLEOD, & McLEOD, P.A., P.O. 950,
Apopka, FL 34703
(407) 886-3300

Attorney for Petitioner
*Counsel of Record

QUESTIONS PRESENTED

(1) Should this case be remanded for consideration in light of the enactment of the 1991 Civil Rights Act, which confirms petitioner's right to a jury, with such proper judicial instruction and relief as may be necessary for appropriate consideration, by an impartial factfinder, of claims arising under 42 U.S.C. § 1981, and Title VII of the Civil Rights Act of 1964?

(2) Have trial courts and courts of appeal, including those in the Eleventh Circuit, misapplied Patterson v. McLean Credit Union to bar claims of racially discriminatory discharges, and thus overruled settled law on their own authority and injured victims of such terminations whose claims arose before Patterson was decided, and which were still pending when the Civil Rights Act of 1991 was enacted into law?

(3) Was Petitioner denied due process and the appearance of justice, by summary affirmance on appeal, of decisions made by a trial judge, who refused to recuse herself without stated reason or to step aside for impartial assessment of a motion and affidavit made for judicial disqualification at the outset, and by a Rule 60 (b) motion for reconsideration of recusal, after trial?

PARTIES

All parties in this matter are set forth in the caption.[1]

1--Respondent Frito-Lay, Inc. is affiliated with the following: A&M Food Services, Inc., Ainwick Corporation Amarillo Pepsi-Cola, Inc., Anderson Hill Insurance Limited, Atlantic Soft Drink Co., Inc., Atlantic Soft Drink Company of Knoxville, Calny, Inc., Belfast Bottling Co. of Reno, Beverage Products Corporation, Beverages, Foods & Services Industries, Inc., Brainerd-Wadena Beverage Co., Contract Beverages, Inc., Contract Recyclers, Inc., Crispflow Limited, Davlyn Realty Corporation, Dr. Pepper Bottling Co. of San Francisco, East Kentucky Beverage Co., Inc., Edmund Industrial Redevelopment Corporation, Elko Bottling Co., El KrAm, Inc., Embotelladora de Uruguay, S.A., Empresas Gamesa, S.A. de C.V., Equity Beverage, Inc., Erie Bottling Corporation, Florida International Fruchtsaftgetraenke GmbH FL Holdings, Inc., Frito-Lay, Inc., Frito-Lay Finance N.V., Frito-Lay of Puerto Rico, Inc.,

Frito-Lay of the Islands, Inc.; Frito-Lay, Texas, Inc.; Frito-Texas, Inc.; General Beverage of Oklahoma, Inc.; General Cinema Beverages, Inc.; General Cinema Beverages of Akron, Inc.; General Cinema Beverages of California, Inc.; General Cinema Beverages of Dayton, Inc.; General Cinema Beverages of Ft. Myers, Inc.; General Cinema Beverages of Georgia, Inc.; General Cinema Beverages of Indiana, Inc.; General Cinema Beverages of Miami, Inc.; General Cinema Beverages of North Carolina, Inc.; General Cinema Beverages of North Florida, Inc.; General Cinema Beverages of Ohio, Inc.; General Cinema Beverages of Springfield, Inc.; General Cinema Beverages of Virginia, Inc. General Cinema Beverages of Washington, D.C., Inc.; General Cinema Beverages of West Virginia, Inc.; General Cinema Beverages of Youngstown, Inc.; Hostess--FL NRO Ltd.; Iron Range Bottling Co., Inc.; IVI Panagopoulas, Inc.; Jackson Davis Bottling Co.; Kentucky

Fried Chicken Corporation; Kentucky Fried Chicken Corporation Holdings, Ltd.; Kentucky Fried Chicken International Holdings, Inc., KFC Corporation; KFC National Management Company; Laurel Group Limited; MBA Brainerd Co.; MBA Dodge City Co.; MBA Elko Co.; MBA Grant Island Co.; MBA Jackson Co., MBA Lyons Co.; MBA Mesa Co.; MBA Omaha Co.; MBA Recyclers Co.; MBA Salt Lake Co.; MBA St. Louis Co.; MBA St. Paul Co.; MBA Tulsa Beverage Co.; MBA Waterloo Co.; MBA Wichita Co.; Mesa Beverage Company; National Beverages, Inc.; New Century Beverage Company; Paige Corporation N.V.; Paine Corporation N.V.; PARCO N.V.; PEI N.V.; Penn Alto Bottling Works, Inc.; Pepsi-Capital Corporation N.V.; PepsiCo., Inc.; PepsiCo Australia Pty, Limited; PepsiCo Enterprises, Inc.; PepsiCo. Finance (Antilles A) N.V.; PepsiCo. Finance (Antilles B) N.V.; PepsiCo. Finance (U.K.) Ltd.; PepsiCo. Holdings Ltd.; PepsiCo. (Ireland) Ltd.' PepsiCo. Overseas Corp.; PepsiCo. Overseas Finance N.V.; PepsiCo World Trading Company, Inc.; PepsiCo World Trading Company (UK) Ltd.; Pepsi-Cola Alton Bottling, Inc.; Pepsi-Cola Argentina, S.A.C.I.; Pepsi-Cola (Bermuda) Limited; Pepsi-Cola Bottling Company of Clarksburg; Pepsi-Cola Bottling Co. of Crisp, Inc.

Pepsi-Cola Bottling Company of Cumberland, Inc.; Pepsi-Cola Bottling Company of Danville; Pepsi-Cola Bottling Company of Dodge City, Inc.; Pepsi-Cola Bottling Company of Grand Island Pepsi-Cola Bottling Company of Johnstown, Pa.; Pepsi-Cola Bottling Co. of Omaha, Inc.; Pepsi-Cola Bottling Co. of Perry, Inc.; Pepsi-Cola Bottling Co. of Los Angeles; Pepsi-Cola Bottling Co. of Lyons, Inc.; Pepsi-Cola Bottling Company of Minneapolis & St. Paul; Pepsi-Cola Bottling Co. of Oklahoma City, Inc.; Pepsi-Cola Bottling Company of Petersburg, Inc., Virginia; Pepsi-Cola Bottling Company of Petersburg, Inc., West Virginia; Pepsi-Cola Bottling Co. of Reading; Pepsi-Cola Bottling Co. of Salinas, Inc.; Pepsi-Cola Bottling Co. of Salt Lake City, Inc.; Pepsi-Cola Bottling Co. of Santa Cruz, Inc.; Pepsi-Cola Bottling Co. of South Jersey, Inc.; Pepsi-Cola Bottling Company of St. Louis, Inc.; Pepsi-Cola Bottling Co. of St. Mary's Inc.; Pepsi-Cola Bottling Co. of Tampa; Pepsi-Cola Bottling Co. of Valdosta; Pepsi-Cola Bottling Co. of Waterloo, Iowa; Pepsi-Cola Bottling Co. of Wichita, Inc.; Pepsi-Cola Bottling Co. of Wilmington; Pepsi-Cola Canada, Ltd.; Pepsi-Cola Canada (NRO), Ltd.; Pepsi-Cola Canada (NRO-Second), Ltd.; Pepsi-Cola Canada

(NRO-Third), Ltd.; Pepsi-Cola Canada (NRO-Fourth), Ltd.; Pepsi-Cola Chile Consultores Ltda; Pepsi-Cola de Espana, S.A.; Pepsi-Cola GmbH; Pepsi-Cola Manufacturing (Ireland); Pepsi-Cola Manufacturing Company, Inc.; Pepsi-Cola Mediterranean, Ltd.; Pepsi-Cola Mexicana S.A. de C.V.; Pepsi-Cola Personnel Inc.; Pepsi-Cola San Joaquin Bottling Company; Pepsi-Cola (Overseas) Ltd.; Pepsi-Cola Distributing Co. of Delaware Valley; Pepsi-Cola Holding Co. of Wilmington and South Jersey, Inc.; Pizza Hut, Inc.; Pizza Hut of America, Inc.; Pizza Hut of Ocmulgee, Inc.; Pizza Hut of Okemah, Inc.; Pizza Hut Properties Pty, Limited; Pizza Huts of the Northwest, Inc; Pizza Hut of Titusville, Inc.; Pizza Hut (UK) Ltd.; Productos PepsiCo, S.A.; QSR, Inc.; Quick Service Restaurants, Inc., Pecot, Inc.; Pedux Realty, Inc.; Rice Bottling Enterprises, Inc.; Rogers Beverages, Inc.; Sabritas S.A. de C.V., Saxton Bottling Co., Inc.; Seven-Up International, Inc. Seven-Up Ireland Limited; Seven-Up Netherlands, B.V.; Seven-Up Southern Hempisphere, Inc.; Smartfoods, Inc.; Smiths' Crisps Limited; Southwest Beverage Corporation; Taco Bell Corp.; Taco Bell Royalty Company; The Concentrate Manufacturing Company of Ireland; The Concentration Manufacturing Company of Puerto Rico; TLF, Inc.; UniBev, Inc.;

UniBev Packaging, Inc.; Walkers Crisps Limited; Walkers Potatoes Limited Waycross Pepsi-Cola Bottling Co. Omitted from the list supplied by counsel for Respondent are said to be approximately 185 insignificant or inactive subsidiaries which, if considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary, and approximately 130 subsidiaries of Pizza Hut, Inc., and 30 subsidiaries of Kentucky Fried Chicken Corporation and Kentucky Fried Chicken Corporate Holdings Ltd., most of which operate restaurants in the U.S., and in foreign countries.

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No. 92-_____

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1991

JOHNNIE K. WALKER,

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v.

FRITO-LAY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The Petitioner, Johnnie K. Walker, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on January 9, 1992.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is unpublished, and is set out in the Appendix to this petition at pages 1a-2a. The order of the court of appeals denying rehearing, which is not reported, is set out at 34a. The judgment of the district court appears at 3a-4a. The findings of fact and conclusions of law on which the judgment is based is presented at 5a through 28a including footnotes. An unpublished summary denial is set out on page 30a as it appeared on the face of Plaintiff's Motion for Disqualification of Federal Judges Resident in Orlando. So is a similar denial set forth on page 33a as it appeared on the Plaintiff's Motion for Reconsideration of Recusal. A bench ruling is set forth at pp. 35a-37a; the judge sustained an objection by Defendant based on its pre-trial motion in limine to exclude from the trial a decision of a state unemployment compensation appeals board and transcripts on which that ruling was based.

RELATED RULINGS

Also contained in the Appendix are the decision of the aforementioned Florida unemployment compensation appeals board at pp. 38a-44a and an order of recusal by the trial judge in another case in which the application for her disqualification was made below. The latter appears at pp. 45a-47a.

JURISDICTION

The judge of the court of appeals affirming the district court's dismissal of the case was entered on January 9, 1992. A timely petition for rehearing was denied on February 28, 1988. On May 19, 1992, Justice Anthony M. Kennedy entered an order extending the time for filing a petition for writ of certiorari to and including June 27, 1992. The jurisdiction of this Court is involved under 28 U.S.C. § 1254(1).

STATUTES, CONSTITUTIONAL PROVISION AND RULES INVOLVED

PL 102-166 (S1745), CIVIL RIGHTS ACT of 1991, 105 Stat. 1071, provides in pertinent part:

> An Act to amend the Civil Rights Act of 1964 to strengthen and improve federal Civil Rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.
>
> Section 1. Short Title. This Act may be cited as the "Civil Rights Act of 1991."
>
> Section 2. Findings: The Congress finds that--(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace...(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.
>
> Section 3. Purposes: The purposes of this act are--(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;...(2) to respond to recent decisions of the Supreme Court by expanding the scope of relevant Civil Rights statutes in order to provide adequate protection to victims of discrimination.

TITLE I--

FEDERAL CIVIL RIGHTS REMEDIES

SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS. Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended--(1) by inserting "(a)" before "All persons within;" and (2) by adding at the end the following new subsections: (b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship; "(c) The rights protected by this section are protected against impaiment by nongovernmental discrimination and impairment under color of State law.

SEC. 102. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION. The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section: SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN

EMPLOYMENT. "(a) RIGHT OF RECOVERY.-(1) CIVIL RIGHTS. In an action brought by a complaining party under section 706 or 717 of the CIVIL RIGHTS ACT of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 from the respondent....(b) COMPENSATORY AND PUNITIVE DAMAGES.--(1) DETERMINATION OF PUNITIVE DAMAGES.--A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual. (2) EXCLUSIONS FROM COMPENSATORY DAMAGES

--Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964. (3) LIMITATIONS.--The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--"(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000. (4) CONSTRUCTION.--Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981). (c) JURY TRIAL.--If a complaining party seeks compensatory or punitive damages under this section--(1) any party may demand a trial by jury; and (2) the court shall not inform the jury of the limitations described in subsection (b)(3). (d) DEFINITIONS.--As used in this section: (1) COMPLAINING PARTY.--The term "complaining party" means--(A) in the case of a person seeking to bring an action under subsection (a)(1)... a person who may bring an

action or proceeding under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.);....(2) DISCRIMINATORY PRACTICE-- The term 'discriminatory practice' means the discrimination described in paragraph (1)....

SEC. 103. ATTORNEY'S FEES. The last sentence of section 722 of the Revised Statutes (42 U.S.C. § 1988) is amended by inserting ", 1977A" after "1977".

SEC. 104. DEFINITIONS. Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end of the following new subsections: (l) The term 'complaining party' means...a person who may bring an action or proceeding under this title. (m) The term 'demonstrates' means meets the burdens of production and persuasion. (n) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program or Federal entity subject to section 717.".

SEC. 107. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATIONS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN IN EMPLOYMENT PRACTICES.(a) IN GENERAL.--Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended

by sections 105 and 106) is further amended by adding at the end the following new subsection: "(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." (b) ENFORCEMENT PROVISIONS:--Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended--(1) by designating the first through third sentences as paragraph (1); (2) by designating the fourth sentence as paragraph (2)(A) and indenting accordingly; and (3) by adding at the end the following new subparagraph; "(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court --(i) may grant declaratory relief; injunctive relief (except as provided in clause [ii]), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Before passage of the Civil Rights Act of 1991, Section 1981 of 42 U.S. provided:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-(2)(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his privileges of employment because of such individual's race, color, religion, sex, or national origin...

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 38 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Right Preserved. The right of trial jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate. (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at the any time after the comencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

Rule 39 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

28 U.S.C. § 144, Judiciary and Judicial Procedure, provides:

> Bias or prejudice of a judge: Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed

> no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 455(a), Judiciary and Judicial Procedure provides:

> Disqualification of justice, judge, or magistrate: Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Rule 60(b), Federal Rules of Civil Procedure, provides in pertinent part:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion an upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect...or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time....A motion uner this subdivision (b) does not affect the finality of a jugment or suspend its operation.

Rule 59, Federal Rules of Civil Procedure, provides in pertinent part:

> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues...(2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity of the United States....(b) Time for Motion. A motion for a new trial shall be serve not later than 10 days after the entry of the judgment.

STATEMENT OF THE CASE

Petitioner filed this action on June 19, 1989. He alleged that the Respondent employer treated him differently from whites in 1988 after he became involved in a dispute with a white female supervisor, and made allegations about racial discrimination at its Orlando plant. The company discharged him in September 3,1988, two days before Petitioner's 10th anniversary as a production worker at the plant.

From the outset of this civil rights action, Petitioner sought full relief pursuant to Title VII of the 1964 Civil Rights Act and 42 U.S.C. § 1981, after the U.S. Equal Employment Opportunity Commission ("EEOC") sent his attorney below a right-to-sue letter dated April 28, 1989. On the face of the complaint was a request for a jury trial.

In the complaint was an allegation that both resident federal district judges in Orlando had

stepped aside less than a year earlier for the third time on motion of Petitioner's attorney. The relief statement prayed the matter would be heard by a judge other than the two in residence in Orlando.

When the Hon. Patricia Fawsett, who was assigned to the case, did not step aside, a motion was filed for her to do so, pursuant to 28 U.S.C. § 144. Petitioner provided a requisite affidavit.

Judge Fawsett was asked to step aside, on the same grounds which caused her to recuse herself less than a year earlier in COG v. City of Orlando, #88-962-Civ-Orl-19 (M.D. FL 1988), and have the case reassigned by the chief judge (App. 44a-46a). In this instance, Judge Fawsett refused to do so, without any stated reason other than that "(t)his motion (sic) is legally insufficient as a matter of law and is denied." (App. 29a).

In 1988-89, Petitioner was a member of a COG. COG sought to protect African-Americans like him from discrimination in the Orlando, FL area.

He participated in group discussions about the federal court proceedings initiated by COG in October, 1988. In the fall of 1988, Petitioner retained the COG attorney to represent him in all matters related to his discharge by Respondent.

In September/October, 1990, immediately before, during and after the trial in this case, the trial judge's antipathy to blacks, especially civil rights complainants, was made known to Petitioner's attorney below: (1) by a former law clerk of the trial judge with whom counsel was associated on a case; (2) by the local bar association president who was a former partner of the judge, at a meeting of the local black bar association to which Petitioner's counsel belonged; and (3) by a veteran local labor lawyer at a meeting of a state commission investigating racial and gender bias in the judicial system in Florida

On the basis of those extra-judicial statements, Petitioner's counsel again asked the

trial judge to step aside, pursuant to 28 U.S.C. § 455a. Timely motions were made for a new trial, and for reconsideration of recusal, pursuant to Rules 60(b) and 59 of the Federal Rules of Civil Procedure. Again Judge Fawsett refused without explanation to step aside (App. 31a).

After trial here, Judge Fawsett in her Findings of Fact and Conclusions of Law acknowledged that her factual determination on the merits was based on her assessment of the credibility of Petitioner (see, e.g., App. 13a) and of Respondent supervisors, especially the white manager, who was the only alleged eyewitness to the events which gave rise to the termination of Plaintiff.

Respondent alleged that the white supervisor had observed from an upstairs office window Petitioner leaving the plant without clocking out and returning to do so. Petitioner claimed he clocked out before he left, to run an errand, and he returned to pick up his tool box and add up his

hours to determine his pay.

All parties agreed the events occurred between 10:30 p.m. and 11 p.m, Saturday, Sept. 3, 1988, after the particular shift had been concluded early by 10:30 p.m. (App. 6a-17a). Petitioner was not notified until he returned, Tuesday, Sept. 6th, after the Labor Day weekend, that his actions on Saturday had been called into question.

Petitioner was terminated on Sept. 8th; his termination first was affirmed by the plant manager on Sept. 13th, and again later after Petitioner appealed. The final internal appeal was concluded at the end of November after Petitioner exhausted all of the requisite steps. That process is described by the judge below in her findings.

However, omitted by her is a determination favorable to Petitioner made for the Florida unemployment compensation appeals board (App. 38a-44a). The decision was made and sent to the company before the final internal appeal (App. 45a).

In the state proceeding, Respondent relied on sworn testimony from that same white supervisor and a Frito-Lay personnel representative. When the company lost, Respondent did not contest the finding by the state agency that any company allegations of misconduct were deficient.

By motion in limine, Respondent did succeed at trial in having the administrative decision (38a -44a) and the hearing transcript kept out of this case for any and all purposes by Judge Fawsett. Not only was that administrative decision kept away from an advisory jury but it also was excluded from the judge's own deliberations.

An all-white advisory jury was convened after Respondent argued against a constitutional one, in its last pre-trial opportunity, more than a year after this action was begun, and more than a year after the decision in Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

Despite the use of an advisory jury, which was relied upon primarily to exclude testimony and documents, such as the administrative decision, the trial court (App. 3a) relied on its own findings of fact and conclusions of law. The judge continued to do so in post-trial determinations. She awarded full costs to Respondent, even though the jury found Petitioner had prevailed on the employer's counterclaim for vacation pay given to the discharged worker after he was terminated.

The costs were appealed separately and the appeals consolidated in the court of appeals (#90-9360/#91-3287). No separate mention was made by the appeals court about the costs issue.

On Jan. 9, 1992, weeks after the passage of the Civil Rights Act of 1991, the court of appeals affirmed without opinion the judgment below of Sept. 21, 1990, and the Findings of Fact and Conclusions of Law by Judge Fawsett on the previous day. In pertinent part, Judge Fawsett ruled:

"On the basis of the Supreme Court's recent decision in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), the Court finds that (Petitioner) is unable to state a claim under § 1981." (App. 17a-18a). "Furthermore, while there is a right to a jury trial on the legal issues in a § 1981 claim, the Court finds, as discussed below, that Plaintiff's § 1981 claim fails as a matter of law in the wake of Patterson v. McLean Credit Union, 109 S.Ct. 1363 (1989). For these reasons, the Court GRANTS Defendant's Motion to Strike Plaintiff's Demand for Jury Trial. The verdict by the jury is treated as advisory." (App. 17a-18a).

On the Title VII claim the judge reserved to herself, she found Petitioner met his initial burden of establishing a prima facie case by a preponderance of the evidence (App. 22a). But she found against Petitioner, because he failed to demonstrate that his dismissal for leaving the premises without permission before clocking out

was a pretext by Respondent for its racially discriminatory purposes, or that Petitioner was victimized by racially disparate disciplinary treatment favorable to whites in Respondent's handling of the same alleged infractions (App. 25a).

In a final footnote, the trial judge noted as a result of a company rule posted in 1985 which established termination as a possible employer action for the infraction, a black female was terminated in 1985 and Petitioner was fired in 1988. Only after a policy was applied exclusively to blacks for four years, "three whites (two males and one female) were terminated for violating this rule in 1989." (App. 29a). The distinction in policy application made here was not in the footnote.

The 1991 Civil Rights Act certainly was not available to the trial judge in 1990, when she made her decision. Neither was it enacted in time for briefing to the court of appeals, although its possible passage was publicly discussed enough to

merit inclusion for Petitioner in the reply brief below, filed on Nov. 5, 1991. Cited and discussed therein was the Civil Rights Act of 1990; it contained provisions similar to those enacted on Nov. 20, 1991.

But the 1991 version had been law for six-seven weeks when the court of appeals without oral argument affirmed the trial court, (App. 1a-2a). See discussion supra. On the basis of the law and possible retroactive application in this case, Petitioner petitioned for rehearing. The petition was denied on Feb. 28, 1992 (App. 34a).

REASONS FOR GRANTING THE WRIT

I. THIS COURT THIS TERM HAS GRANTED PETITIONS FOR CERTIORARI TO THREE OTHER CIRCUITS, TO HAVE THEM CONSIDER § 1981 CLAIMS IN LIGHT OF THE CIVIL RIGHTS ACT OF 1991. THE ELEVENTH ALSO SHOULD DO SO.

As yet, there is no definitive ruling either here or from any federal circuit about the applicability of the Civil Rights Act of 1991 to § 1981 claims pending in the federal court system when the legislation became law in November, 1991.

This case was pending on appeal at the time. Weeks later, without reference to the Act, the Eleventh Circuit affirmed the decision of the trial court that the § 1981 claim failed as a matter of law, because that statute, as it existed in effect when this case was initiated, had been judicially decided in this jurisdiction not to apply to racial discrimination in terminations by employers.

That affirmance incorporated the trial court finding that without the § 1981 claim Petitioner had not been entitled to a trial by jury. The trial

judge acknowledged specifically that this Court regarded the issue of the applicability of § 1981 to discharge cases to be an open question, based on her interpretation of Lytle v. Household Manufacturing, Inc., 110 S. Ct. 1331, 1336, n. 3 (1990); Id., at 1339 (O'Connor, J., concurring); Jett v. Dallas Independent School District, 109 S. Ct. 2701, 2710 (1989) (App. 27a).

The trial court did not have the opportunity to consider the applicability of Civil Rights Act changes to judicial interpretation of § 1981. But the changes had been made when the Eleventh Circuit affirmed her decision on Jan. 9, 1992.

Since the court of appeals had not referred to the Act in its ruling, Petitioner sought a re-hearing to have the court rule on the applicability of the Act to his § 1981 claim and demand for a jury. The Eleventh Circuit denied the request.

On February 19, 1992, the U.S. Circuit Court for the District of Columbia agreed to hear an interlocutory appeal in Van Meter v Barr, #92-8003 (D. C. Cir. 1992) (to decide whether the 1991 Act applied to cases pending before the law went into effect the previous November). According to Joseph M. Sellers, of the Washington Lawyers' Committee for Civil Rights Under Law, as of that date, 19 district courts had held that the 1991 Act applied retroactively and 25 judges had rejected its retroactive application.

Courts below still are struggling with the fine points of retroactive applications, e.g. whether the kind of relief at issue is procedural or substantive, Sudtlelgte v Sessions, 90-1016-CV-W-6 (W.D. Mo. April 21, 1992), 60 U.S.L.W. 2690 (May 12, 1992).

This Court has granted certiorari by summary dispositions and remanded to the District of Columbia Circuit, and to the Fourth and

Eighth Circuits for review § 1981 claims in light of the 1991 Civil Act. Like Petitioner's case here, the cases being considered were in the federal court system when the legislation became law. Gersman v. Group Health Association, Inc., 931 F. 2d 1565 (D. C. Cir. 1565), cert. granted, S. Ct. #91-724, 60 U.S.L.W. 3519 (Jan. 28, 1992); Holland v. Virginia Banks, Inc., (Fourth Circuit, unpublished), cert. granted, S. Ct. #91-974, 60 U.S.L.W. 3577 (Feb. 25, 1992); Hicks v. Brown Group, Inc., 946 F.2d 1344 (8th Cir. 1991), and, separately 57 FEP Cases 835, cert. granted, #91-1116, 60 U.S.L.W. 3598 (March 3, 1992). Each of those cases is summarized in U.S. Law Week: Gersman v. Group Health, supra, 60 U.S.L.W. 3422 (Dec. 10, 1991); Holland v First Virginia Banks supra, 60 U.S.L.W. 3527 (Jan. 28, 1992); and Hicks v. Brown, supra, 60 U.S.L.W. 3586 (Feb. 25, 1992).

The first two questions presented to this Court are similar substantively to those in Holland v. Virginia, supra, 60 U.S.L.W. 3527 (Jan. 28, 1992). For their determination, this Court should grant the writ of certiorari in this case and remand this matter to the Eleventh Circuit for determination in light of the 1991 Civil Rights Act.

II. THE ELEVENTH CIRCUIT CONTINUES TO RELY ERRONEOUSLY ON ITS INTERPRETATION OF PATTERSON V. MCLEAN CREDIT UNION IN § 1981 EMPLOYMENT DISCRIMINATION DISCHARGE CASES IN ITS JURISDICTION WITHOUT REGARD TO POSSIBLE APPLICABILITY OF 1991 CIVIL RIGHTS ACT CHANGES IN LAW.

On Feb. 3, 1992, the Eleventh Circuit determined that a §1981 racial employment discrimination discharge claim failed under this Court's intervening ruling in Patterson v. McLean Credit Union, 491 U.S. 164 (1989), Pearson v. Macon-Bibb County Hospital Authority, 952 F.2 1274 (11th Cir. 1992). In Pearson, the Eleventh Circuit identified a clear mandate in Patterson

for retroactive application of the decision to dismiss all § 1981 discharge claims, id., 1276-77.

So in Pearson, the Eleventh Circuit affirmed summary judgment. Concluding that Patterson language limiting § 1981 only to conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process, the Eleventh Circuit Pearson ruling relied on its own precedent by other panels, which also interpreted Patterson to deny § 1981 claims in employment discharge cases. Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1520 (11th Cir. 1991) and Thompkins v. Dekalb County Hosp. Auth., 916 F.2d 600, 601 (11th Cir.1990 (per curiam), cited in Pearson at 1276-77.

No mention whatsoever is made in Pearson about the possible application of the 1991 Civil Rights Act, passed more than two months., earlier to § 1981 claims in employment discharge cases pending in the federal courts when it became law.

The Eleventh Circuit applied a similar analysis on Nov. 5, 1991, when passage of the Act appeared to be imminent. The court of appeals denied a demand for a jury in a § 1981 employment race discrimination discharge case, Wall v. Trust Co. of Georgia, 946 F.2d 805 (11th Cir. 1991). "Since the trial court properly dismissed Wall's section 1981 claim, her equitable claim under Title VII was not entitled to a trial by jury, Harrison (v. Associates Corp. of North America, 917 F.2d 195,) 198 (5th Cir. 1990). Wilson v. City of Aliceville, 779 F.2d 631 (11th Cir. 1986)," id. at 809.

On Jan. 9, 1992, when the Eleventh Circuit affirmed the trial court decision here, that court of appeals updated the applicable law as it was known within the jurisdiction. The trial judge had acknowledged there was a split in the federal circuits and in district courts about the applicability of Patterson to discharge cases.

This Court has never ruled on the issue. At the time the trial judge made her ruling, she observed that the Eleventh Circuit had not decided the issue either. However, she determined on the basis of Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir. 1990) that the Eleventh Circuit would join those applying Patterson to deny § 1981 claims in discharge cases (App. 20a-21a). By hindsight, she obviously was correct.

Such denial of a § 1981 claim automatically resulted in the 11th Circuit in denial of a jury if the only other federal claim arose under Title VII. Neither the trial court nor the Eleventh Circuit has applied this Court's holding on that issue in Lytle v. Household Manufacturing, Inc., 108 L.Ed. 504, (1990). Justice O'Connor's concurrence was cited supra in the discussion here regarding the absence of decision by this Court about the applicability of Patterson to racially discriminatory discharges.

In Lytle, this Court relied on the Seventh Amendment preservation of the right to trial by jury to justify one for that petitioner, when his § 1981 claim was dismissed on the eve of trial, and the trial court itself resolved the remaining Title VII equitable issue.

In Lytle, the court refused to consider the applicability of Patterson since that decision had not been available to the courts below. The trial court was found to have erroneously ruled on the Lytle § 1981 claim on other grounds. The case was returned for jury trial below.

Both Patterson and Lytle and their applications in the Eleventh Circuit should have come under scrutiny in this case in light of the 1991 Civil Rights Act, after the law was timely called to the attention of the appeals court. No other circuit in published decisions appears to have ignored the Act as clearly as the Eleventh Circuit.

While other courts are weighing the applicability of the Act to cases pending in the federal system when it became law, in light of decisions by this Court on retroactivity aspects of such laws, in Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969) and Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974) on the one hand, and Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) on the other, the Eleventh Circuit has shown no signs of entering the debate.

While Justice Scalia, in concurrence, in Kaiser Aluminum and Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990) has observed that Bradley and Bowen are "in irreconcilable contradiction on the issue," the Eleventh Circuit appears to avoid the matter entirely by ruling, not only without regard to the applicability of the 1991 Act, but with persistence in its own interpretation of Patterson. The Eleventh Circuit has done so without further guidance from this Court, to deny the benefits of

either the old or new versions of § 1981 to individuals like Petitioner, who claim to have been victims of racially discriminatory discharges.

This Court should grant certiorari in this case so that Petitioner and innumerable others in the Eleventh Circuit do not lose constitutional rights including a trial by jury, before the applicability of the Act to their cases is resolved.

III. THE APPEARANCE OF JUSTICE IN THIS CASE REQUIRES RECONSIDERATION OF THE MERITS OF PETITIONER'S CLAIMS IN ACCORDANCE WITH DUE PROCESS.

From the outset, Petitioner sought recusal of the judge below, because she, along with the other federal judge resident in Orlando, FL, had recused themselves less than a year earlier in a race discrimination case brought by a black civil rights organization and others, COG v. City, supra.

Petitioner was a COG member who participated in the group's successful decision to have the judges recuse themselves, primarily because they were perceived as being biased against

the only attorney who made himself available to the group and its membership in Orlando. Petitioner also had retained that attorney below.

When Petitioner sought by affidavit to have the judge below recused pursuant to 28 U.S.C. § 144, she denied his application, because, she wrote, "(t)his motion is insufficient as a matter of law" (App. 29a). No explanation was given.

The statutory provision requires that whenever a party to any proceeding in a district court makes and files an affidavit that the judge before whom the matter is pending has a personal bias or prejudice against him, such judge shall proceed no further, id. Another judge is assigned to the case. Conceivably a succeeding jurist can determine that no bias existed at all and the matter should be returned to the judge originally assigned to hear the case.

By finding the motion insufficient, as matter of law, the judge apparently intended to

reject the work of the attorney without finding fault with the affidavit of Petitioner. But she stated no reason for having done so.

Prejudice against a party's attorney usually is insufficient to justify recusal, unless, as here, in light of COG v. City, supra, a party can show that such a controversy could demonstrate a bias against him, Diversified Numismatics v. City of Orlando, 949 F.2d 382 (11th Cir. 1991). Without such opportunity, Petitioner was required to face a trial before the judge whose neutrality he questioned.

The issue is not appealable immediately except in the most extraordinary circumstances, In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir. 1980). All Fifth Circuit decisions before Oct. 1, 1981, are binding in the Eleventh, Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

Petitioner still expected to have the benefit of an impartial factfinder on the merits, since he had no reason to doubt until the eve of trial that the matter would be heard by the requisite constitutional jury he had demanded. Then more than a year after Patterson, Respondent objected to Petitioner's demand for a constitutional jury.

After the judge first suggested that objection might have been waive d by the delay, she decided to convene a jury. If, as she stated in advance she believed, Patterson precluded both th § 1981 claim and consequently the jury, she would declare the panel to be advisory, as she later did.

While the jury sat Respondent was able to use it for good purpose, e.g. to have evidence excluded as prejuicial, even if relevant. The crucial items were a decision of a state unemployment compensation appeals board (App. 37a-43a) and the tapes and transcripts of the sworn testimony underlying that ruling.

Petitioner offered that evidence to show that the Respondent's justification for the termination had been pretextual. Such evidence certainly would not have been excluded properly by a judge hearing the case without jury. The Eleventh Circuit subsequently determined that such evidence is not excludable with a jury, Barfield v. Orange County, 911 F.2d 644 (11th Cir. 1990). But it was too late for the evidence here.

Petitioner had gotten the worst of all worlds from a judge whose impartiality he questioned. He could not rely on any findings of fact by the state administrative agency, or even the jury's verdict rendered without knowledge of that decision. The judge was to render her own uncontradicted findings of fact.

"An advisory jury merely advises. Its findings of fact are not binding on the trial court. Indeed the court is free to adopt its findings in whole or in part to disregard them altogether (cite

omitted). The ultimate responsibility for finding the facts remains with the court," Wilson v. City of Aliceville, 779 F.2 631, 635-636 (11th Cir. 1986).

By using the jury as she had done, the judge also avoided contradiction by the unemployment compensation appeals board decision. Now she was free to fashion her own findings of fact from evidence and assess credibility without encumbrance. She did so--against Petitioner.

One finding, however, was less subjective. The company had terminated only one person, a black female, before it discharged Petitioner for his alleged infraction. That fact is artfully disguised in a final footnote to the trial judge's findings of fact an conclusions of law.

Without explanatioo, the judge somehow found relevance in the fact that three whites had been terminated for the infraction in 1989--after Petitioner was terminated, after he brought his

claim of discrimination to the EEOC.

After trial, when Petitioner's attorney learned from extra-judicial statements discussed supra that the judge historically had been known for antipathy toward black civil rights petitioners and advocates for them, he moved for a new trial, and asked her to reconsider recusal, pursuant to 28 U.S.C. §455a. See also Rules 59 and 60(b), F.R.Civ.P. She denied both motions without comment.

On appeal, the Eleventh Circuit ignored entirely the issue of bias and the handling when it was raised below, first in the complaint, then by motion and affiavit pursuant to 28 U.S.C. § 144, and, finally, by a 60(b) motion for reconsideration of recusal, pursuant to 28 U.S.C. § 455a. This Court has approved such use of the rules to preserve the appearance of justice, Liljeberg v. Health Services Acquisitions Corp., 486 U.S. 847 (1988).

The Eleventh Circuit has been criticized for reducing Liljeberg to a matter in which a party

alleging bias has to show not only prejudice but that the refusal of judicial disqualification proved to be something more than harmless error, K. Fall, "Liljeberg v. Health Services Acquisition Corp.: The Supreme Court Encourages Disqualification of Federal Judges Under Section 455(a)," 1989 Wisc. L. Rev. 1033, 1058-59.

By affirming the judge, without comment on the attack on her partiality, the Eleventh Circuit dispensed with this § 1981 claim and a right to a jury trial, with litle expenditure of judicial resources. The Lytle majority cautioned against such erosion of constitutional an civil rights in these cases for the sake of economy, and stressed the need for assurance, usually through the jury system, that civil rights litigants will get justice in the courts, id., 108 L.E.2d, supra, at 516-517.

The possibility of reversing the taint of bias below should provide further incentive to have this case sent back to the Eleventh Circuit.

CONCLUSION

For the above reasons, certiorari should be granted and the case remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of the Civil Rights Act of 1991, just as this Court has ordered it to be done in similar cases arising from the District of Columbia, Fourth, and Eighth Circuits. This case is suitable for such an assessment.

Respectfully submitted,

JOHNIE A. McLEOD*
McLEOD, McLEOD, and McLEOD, P.A.
P.O. 950, Apopka, FL 34703
(407) 886-3300
Attorney for Petitioner

*Counsel of Record

UNPUBLISHED--**DO NOT PUBLISH**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-3960
NON-Argument Calendar
D. C. Docket No. 89-522-CIV-Orl-19

JOHNNIE WALKER,

Plaintiff-Counterdefendant-Appellant,

versus

FRITO-LAY, INC.,

Defendant-Crossclaim Plaintiff-Appellee.

NO. 91-3287
Non-Argument Calendar
D. C. Docket No. 89-522-Civ-Orl-19

JOHNNIE WALKER,

Plaintiff-Appellant,

versus

FRITO-LAY, INC.,

Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(January 9, 1992)

Before COX and BIRCH, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

The judgment of the district court entered in this case on September 21, 1990, that was based upon the findings of fact and conclusions of law entered in this case on the 20th day of September, 1990, is AFFIRMED.

UNPUBLISHED **JUDGMENT IN A CIVIL CASE**

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
89-522-CIV-ORL-19

Decided Sept. 20, 1990

Johnnie Walker,

Plaintiff

v.

FRITO-LAY, INC.,

Defendant.

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

x **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT Plaintiff's claim under § 1981 is dismissed for failure to state a claim. The Court finds in favor of the Defendant, Frito-Lay, Inc., on the Title VII claim. Adopting the verdict of the advisory jury, the Court rules that the Defendant, Frito-Lay, Inc., prevails on the claim of racial discrimination, and that Plaintiff, Johnnie Walker, prevails on Defendant's claim against him for vacation pay.

Date: September 21, 1990

DAVID L. EDWARDS
Clerk

s/ Bessie S. Lamb
(By) Deputy Clerk

(UNPUBLISHED)

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
89-522-CIV-ORL-19

Johnnie Walker,

Plaintiff,

v.

FRITO-LAY, INC.,

Defendant.

Sept. 20, 1990

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The trial of this case commenced September 6, 1990 on Plaintiff's claim of race discrimination pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981. Prior to the beginning of the trial, Defendants filed a Motion to Strike Plaintiff's Demand for Jury Trial (Doc. No. 32), and Plaintiff filed his Opposition to that Motion (Doc. No. 36). The Court announced that it would reserve ruling on the Motion

until the conclusion of the trial, and that in the event the Motion to Strike was granted, the jury's verdict would be treated as an advisory verdict.

After hearing the evidence and the argument of counsel, the Court enters its Findings of Fact and Conclusions of Law as follows.

FINDINGS OF FACT

Plaintiff, Johnnie Walker, during his approximately ten years of employment with Defendant, Frito-Lay, Inc., was given several citations for infractions and improper conduct as well as two commendations during the job while he was being supervised by both black and white employees (Plaintiff's Exhibits 7-11, 27, 28, 30, 31; Defendant's Exhibits 23d, g, f, n, s, ab; Plaintiff's Exhibits 34b and c). However, these disciplinary infractions and commendations are not relevant to the issue presented in this case.

On Saturday, September 3, 1988, Labor Day weekend, Walker, who is black, was working the second shift in the packaging department at Frito-

Lay from 2:30 p.m. until midnight. His supervisor that evening, Jessie Robinson, who is also black, was on his way to take care of a problem involving potato chips spilling from an Allen conveyer system when Robinson was approached by his superior, Mr. Paul Youngpeter, second in command under the plant manager. The time was 10:25 p.m., shortly before the second shift was to enjoy an early shut down at 10:30 p.m. that night. Robinson advised Youngpeter that Robinson could not speak to him at that time and Robinson walked over to the three packing machine employees working that evening--Gordon Pratt, Bob Bailey and Plaintiff Walker. Robinson took Bailey with him up to the Allen conveyer on the third level of the plant, leaving Walker and Pratt working at the packing machines. Youngpeter went back to his office to wait until Mr. Robinson became available so that he could speak with him.

At 10:35 p.m., while Youngpeter was sitting in his office, he saw Plaintiff Walker exiting an

east door of the plant which was not to be used by employees unless they were taking trash to a compactor. He saw Plaintiff jog around Defendant's trailers to a parking lot, bend down and look under a white Pontiac Grand Am car, enter this vehicle, and drive it out of the Defendant's parking lot and up a public street to a Circle K. Later he observed Walker return in the Grand Am to the parking lot, park the car in the same parking spot, and jog back to the east side of the building.

Youngpeter immediately went to the time clock which is used by employees to clock in and out of work to check the time on the face of the time clock against his own watch. Both his watch and the time clock registered 10:45 p.m.. Youngpeter then began to look for Plaintiff. Although he observed Gordon Pratt clocking out prior to leaving the plant, he was unable to locate Plaintiff.

Robinson and Youngpeter then checked the time cards. Walker's time card reflected that he had clocked out at 10:43 p.m. (Defendant's Exhibit

4). Pratt's time card reflected that he had clocked out at 10:46 p.m. (Defendant's Exhibit 55). The difference between the clock out time on the time cards of these two employees was approximately three minutes.[1]

Failing to locate Walker in the plant that evening, Defendant's management waited until Plaintiff returned on the next workday, September 6, to question him concerning his actions on Saturday evening.

Plaintiff's version of the facts given at trial was as follows. While he was at the bathroom, a co-employee, Merdis Brown, asked him to take her car and put air in one of her tires. Walker stated that he clocked out of the plant, went out a side door which "everyone uses," got into Ms. Brown's car, and drove it out of the parking lot across the street to the Circle K to an air pump. At the Circle K he found that he did not have a quarter and that the store was closed. Although he saw that the 7-Eleven across the street was open, he returned to

Frito-Lay without obtaining air in the tire, parked Ms. Brown's car in the same parking spot, and jogged back to the east door where he reentered the plant because he had forgotten his tool box and because he wanted to compute the time on his time card so that he could keep a record of the hours he had worked. When he reentered the plant, he saw Bailey and Pratt. He then left the plant, proceeded in his car to Ms. Brown's car to leave her keys under her car seat, and drove to his home several miles away in an area known as Rosemont, arriving there before 11:00 p.m..

There is no dispute in the evidence that Plaintiff did not have permission to leave the plant without clocking out and that Plaintiff knew that leaving the plant without clocking out was a violation of company rules which could result in termination. The evidence reflects that it would take approximately seven minutes to leave the plant, take a car to the Circle K, and return to the plant in the manner described by Plaintiff.

Plaintiff was advised on September 6, 1988 that his case would be investigated, and on September 8, 1988 he was terminated for violating the plant work rules prohibiting leaving the plant during working hours without clocking out and falsification of time cards (Defendant's Exhibit 9).

Plaintiff prosecuted his case through an internal appeal process at Frito-Lay. After carefully researching the facts of the case, and after listening to Plaintiff's version of the facts at an appeal hearing on September 13, 1988, Mr. Irving Mathews, the plant manager, who is also black, affirmed Plaintiff's termination by letter dated September 26, 1988. (Plaintiff's Exhibit 18b). This decision was affirmed on final appeal (Plaintiff's Exhibit 23 dated November 28, 1988).

Plaintiff's claim to the Equal Employment Opportunity Commission concerning his termination resulted in the issuance of a right-to-sue letter dated April 28, 1989 by which the EEOC notified Mr. Walker that "the evidence obtained du-

ring the [EEOC] investigation does not establish a violation of [Title VII]." Defendant's Exhibit 1).

From the evidence it appears that Plaintiff's position was filled by a white female who was working during Plaintiff's shift and on his same work detail. This lateral move was made during a period in which the company was laying off employees. Plaintiff contends that he was racially discriminated against because in 1984 a white employee, Marc Ann Drake, was cited for leaving the premises before clocking out but was not terminated. Ms. Drake testified that since the time she had been hired in 1969 at Frito-Lay it had been a regular practice to walk across the street on breaks to get food, the orders for which had been placed in advance by telephone.[2] While she was returning from the restaurant, her supervisor advised her that leaving the plant without clocking out was a work rule violation. Ms. Drake testified that at the time she had no idea this was a viola-

tion of a rule. Nevertheless, her employment record reflected that she was cited for this violation. The evidence also reflected that after this incident and before Plaintiff's termination, the company posted a work rule which advised employees that leaving the premises without permission and without first clocking out was a serious infraction which would result in discipline, including termination.[3]

As noted above, and in contrast to the situation described by Ms. Marc Ann Drake, Plaintiff admits that he knew before leaving the plant premises that departures of an employee without first clocking out is an offense for which termination can be imposed. Plaintiff contends that he did clock out before he left the premises to take Ms. Brown's car to the Circle K and that he returned to the plant only to get his tools and to count up his hours. The Court finds that Plaintiff's version of the facts is not credible.[4]

Plaintiff's testimony at trial and previous statements contained inconsistencies which are worthy of note. On direct examination during trial, Plaintiff testified that when he finally left the premises on the evening of September 3, 1988, he departed through a side door. When questioned by his supervisors near the time of the event, Walker testified that he departed from the front door of the plant on September 3rd. Further, at trial Walker testified that he was fired for falsifying his time card, leaving the premises without first clocking out, and for intoxication. Later during cross-examination he admitted that nothing about intoxication had been said to him or placed in his letter of termination. During his deposition testimony, Walker testifed that he put his tool box in his care before going to the car of Ms. Brown and driving her car to the Circle K. At trial he testified that he returned to the plant to get his tool box as well as to check his time card to calculate the hours he had worked. In addition to the above,

at the meeting held on September 13, 1988, on Plaintiff's appeal, Plaintiff contended that Mr. Youngpeter had not seen Plaintiff do what Youngpeter stated he had seen. Finally, during deposition testimony, Walker testified that he had clocked out before he had seen Ms. Brown and she had made her request to him.

More importantly, it would not be possible for Plaintiff to perform the errand for Ms. Brown as he and Mr. Youngpeter described its performance between 10:43 p.m., the time on his time card, and 10:45 p.m., the time when Mr. Youngpeter looked at the official time clock after he saw plaintiff return to the plant. It would be impossible for him to perform this errand between the time he clocked out (10:43 p.m.) and the time that Mr. Pratt clocked out (10:46 p.m.). Further, Walker could not clock out at 10:43 p.m., do the errand he described for Ms. Brown, return to the plant, and then drive home in time to arrive there by 10:55 p.m. as he stated to his supervisor.

Plaintiff's version of the facts is also not credible from circumstantial evidence. If plaintiff had clocked out before he ran the errand, as he testified, it would have been more logical for him to exit from the front door of the plant because the employee time clock is located closer to the front door, which was the door used by employees to enter and exit the premises, and the front door is closer to where Ms. Brown's car was parked. The east door which Plaintiff used was not to be used by employees except under certain circumstances[5] and was farther away from the time clock and Ms. Brown's car than the front door. From the evidence it appears that Plaintiff decided to take advantage of his supervisor's absence on the third level of the plant to leave the premises without permission, run an errand, and return to the plant before he clocked out.

Defendant's managerial employees thoroughly and carefully researched the case before termi-

noting Plaintiff. The evidence supports the conclusion of Defendant's managerial employees that Plaintiff willfully, knowingly, and deliberately violated a work rule and then lied to conceal his actions when he was caught. His actions constitute falsification of his time card and leaving the work premises prior to clocking out.

CONCLUSIONS OF LAW

Motion to Strike Plaintiff's Demand for Jury Trial

In this Circuit, there is no right to a jury trial for claims under Title VII. Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1529 n. 4. (11th Cir. 1990); Wilson v. City of Aliceville, 779 F.2d 631, 635 (11th Cir. 1986).

Furthermore, while there is a right to a jury trial on the legal issues in a § 1981 claim, the Court finds, as discussed below, that Plaintiff's § 1981 claim fails as a matter of law in the wake of Patterson v McLean Credit Union, 109 S.Ct. 1363 (1989).

For these reasons, the Court GRANTS Defendants' Motion to strike Plaintiff's Demand for Jury Trial (Doc. No. 32). The verdict of the jury is treated by the Court as advisory.[6]

Section 1981 Claim

On the basis of the Supreme Court's recent decision in Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), the Court finds that Plaintiff is unable to state a claim under § 1981. In Patterson, the Supreme Court held that an employee's claim of racial harassment by an employer is not actionable under § 1981 because § 1981 is limited, in the employment discrimination context, to forbidding discrimination in the making and enforcement of contracts. Section 1981 "covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." Patterson, supra, at 2374.[7]

While the Supreme Court has not directly stated that a claim of discriminatory discharge would also fall outside the scope of § 1981[6], the Fifth, Seventh and Ninth Circuits, as well as many district courts, have so held. Reeves v. MCI Telecommunications Corporation, 909 F.2d 144 (5th Cir. 1990); Lavender v. V & B Transmission and Auto Repair, 897 F.2d 805 (5th Cir. 1990); McKnight v. General Motors Corporation, 908 F.2d 104 (7th Cir. 1990); Courtney v. Canyon Television & Appliance Rental, Inc., 899 F.2d 845, 849 (9th Cir. 1990); Coleman v. Domino's Pizza, Inc., 728 F. Supp. 1528, 1531-32 n. 3 (S.D. Ala. 1990). The Eighth Circuit disagrees with this view and has held that a claim of racially discriminatory discharge continues to be actionable under § 1981. Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990). The Second Circuit recently indicated that a discriminatory discharge suit under § 1981 can survive after Patterson only if the plaintiff prop-

erly alleges that the defendant entered into the employment contract with the intent to later terminate the contract on the basis of race. Gonzalez v. The Home Insurance Company, 909 F.2d 716 (2d Cir. 1990). The Eleventh Circuit has not addressed this precise question. It has held, however, that § 1981 does not provide a remedy for an employee who is injured by his former employer's efforts to persuade his new employer to fire him in retaliation for the employee's filing an EEOC complaint against the former employer. Sherman v. Burke Contracting, Inc., 891 F.2d 1527 (11th Cir. 1990).

Although the Defendant in Sherman was not accused of discriminatory discharge, the Eleventh Circuit recognized in that case that the Patterson decision "significantly narrowed the reach of [§ 1981] in the context of employment discrimination suits." Id. at 1534. The Sherman Court interpreted the Patterson decision as holding that "suits based on post-contractual events cannot be brought

under section 1981." Id. Thus, it seems likely that the Eleventh Circuit would adopt the majority view that, in light of Patterson, a discriminatory discharge claim is not actionable under § 1981, at least where, as in this case, there is no reasonable way to construe the discharge as a refusal to enter into a new contract with the plaintiff.

This Court rules, therefore, that Plaintiff's § 1981 claim fails as a matter of law. However, because this question has not been squarely addressed by the Eleventh Circuit, it is possible that the Court of Appeals may determine, as did the Eighth Circuit, that a claim for discriminatory discharge may still be brought under § 1981.[9] It was primarily for this reason that the Court deemed it prudent to allow the § 1981 claim to be considered by an advisory jury so as to avoid the necessity for a new trial should this Court's legal ruling be reversed on appeal.

Title VII Claim

Plaintiff sought to prove a case of disparate treatment.[10] He conceded that he did not have direct proof of discrimination. In such circumstances, a plaintiff has the initial burden of establishing a prima facie case. If the plaintiff establishes a prima facie case, the burden of production shifts to the defendant. The plaintiff retains, however, the ultimate burden of proving discriminatory intent on the part of the defendant, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

Mr. Walker is a member of a protected minority, he was qualified for the position which he held, he was terminated from that position for a violation of a time clock rule whereas a white employee had previously been cited for the same violation but had not been terminated, and his position appears to have been filled by a white female. Thus, the Court finds that Plaintiff met his

initial burden of establishing a prima facie case by a preponderance of the evidence. See Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1185 (11th Cir. 1984). See generally McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Because Plaintiff made out a prima facie case of discriminatory discharge, the burden shifted to Defendant to articulate a legitimate, nondiscriminatory reason for its action. Defendant met this burden by putting forward specific, credible evidence to indicate that Plaintiff was indeed terminated for violation of the time clock rule.

Defendant having introduced evidence of a legitimate, nondiscriminatory reason for its action, the Court next considers whether Plaintiff proved that Defendant's proffered reason was merely a pretext for discrimination. The Court finds that Plaintiff did not meet this ultimate burden.

After carefully considering all the evidence in the case, the Court finds that Plaintiff did not

establish that discriminatory intent more likely than not motivated the termination of Plaintiff or that Defendant's proferred reason for the termination is unworthy of belief. The decision to terminate Plaintiff was not a hasty action, but, rather, a considered decision made by Plaintiff's supervisors after careful investigation of the facts. Termination for violation of the time clock rule is not a departure from Frito-Lay's normal business practice. Ms. Drake, the white employee who was cited but not terminated by Defendant for violation of the same rule several years previously, claimed that she did not know about the rule at the time of her violation, and it is undisputed that subsequent to Ms. Drake's citation, the company publicly posted the work rule announcing that leaving the premises without permission before clocking out is a serious infraction which could result in termination.[11] Indeed, Plaintiff admits that he was aware he could be terminated for violating the

time clock rule. Plaintiff's contention, in essence, is that his version of the facts was disbelieved for racially discriminatory reasons. The Court finds this contention contrary to the evidence.

Conclusion

Plaintiff's claim under § 1981 is dismissed for failure to state a claim. The Court finds in favor of Defendant on the Title VII-claim. Adopting the verdict of the advisory jury, the Court rules that Defendant prevails on the claim of racial discrimination, and that Plaintiff prevails on Defendant's claim against him for vacation pay. The Clerk is directed to enter judgment accordingly.

DONE AND ORDERED at Orlando, Florida, this 20th day of September, 1990.

Patricia C. Fawsett
Patricia C. Fawsett
United States District Judge

Footnotes

1--The Frito-Lay, Inc. time clock is based on one hundred increments in an hour and therefore the clock-out time is rounded off in this opinion to the best advantage of the Plaintiff.

2--Ms. Drake was eventually terminated by Mr. Mathews shortly before he terminated Plaintiff because Ms. Drake had been sleeping on the job. She testified that she felt her termination was appropriate.

3--The plant manager, Mr. Mathews, testified that the reasons for this work rule were (1) to insure that employees were properly paid for time worked and (2) to protect the company from liability if employees were off the premises without having first clocked out.

4--Although Adele Fitzgerald testified that from time to time there was a difference between the time on the time clock and the time on clocks placed at various locations around the plant, there is no evidence that there was any malfunction or incorrect time on the official clock used by employees to record their arrival and departure at work on September 3, the date in question. Further, as noted above, the time clock also had a

4 (cont.)--clock on its face which accurately reflected the time being clocked on the time cards of the employees. Therefore, the Court finds that the time on the time cards of Mr. Walker and Mr. Pratt on the evening of Sept. 3, 1988 are correct.

5--There is no evidence that Plaintiff was carrying trash to the compactor, the only use allowed for this door. Plaintiff testified affirmatively that he did not take out his trash.

6--At the commencement of trial, the Court informed the parties that it probably would rule as a matter of law that the § 1981 claim fails and that the jury would be an advisory one. The Court elected to convene an advisory jury in this case as the effect of Patterson on discriminatory discharge suits has not been definitely stated by the Eleventh Circuit, as discussed later in this opinion.

7--§ 1981 provides: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

8--The Supreme Court, apparently, considers this to be an open question. See Lytle v. Household Manufacturing, Inc., 110 S. Ct. 1331, 1336, n. 3 (1990); Id., at 1339 (O'Connor, J., concurring); Jett v. Dallas Independent School District, 109 S. Ct. 2701, 2710 (1989).

9--Another District Court within this Circuit has so ruled. Kriegel v. Home Ins. Co., 739 F. Supp. 1538 (N.D. Ga. 1990). But see Coleman v. Domino's Pizza, Inc., 728 F. Supp. 1528, 1531-32 no 3. (S.D. Ala. 1990); Debailey v. Lynch-Davidson Motors, Inc., 734 F. Supp. 974, 976 n. 2 (M.D. Fla. 1990).

10--There has been no evidence of a facially neutral employment practice having a discriminatory impact.

11--This work rule was posted in 1985. Thereafter, a black female was fired in 1985. Plaintiff, a black male, was fired in 1988, and three whites (two males and one female were terminated for violating this rule in 1989).

UNPUBLISHED ENDORSEMENT ON ONE PAGE MOTION

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

89-522-CIV-ORL-19

Johnnie Walker,

Plaintiff,

v.

FRITO-LAY, INC.,

Defendant.

Motion Filed Sept. 28, 1989
Motion Denied Oct. 17, 1989

PLAINTIFF'S MOTION FOR DISQUALIFICATION OF FEDERAL JUDGES RESIDENT IN ORLANDO

COMES NOW Plaintiff on the basis of his affidavit and that of his attorney and moves for the recusal of resident judges pursuant to 28 U.S.C. § 144. Plaintiff, a member of the Committee of Organized Groups ("COG") in 1988-89 bases his request in

pertinent part on the recusal of both of those judges in COG v City of Orlando, 88-962-Civ-Orl-10, late last year. Both did so, because the involvement of his attorney herein in other cases in which they had recused themselves.

WHEREFORE, having no other remedy at law or in equity, Plaintiff asks these judges to proceed no further. Upon recusal, they should have the matter forwarded for reassignment to the chief judge, W. T. Hodges, before a final judgment can be entered in this case.

Gabe Kaimowitz
Gabe Kaimowitz FL Bar #0633836
3173 Whisper Lake, #A, Winter Park, FL 32792 (407) 678-3713, Attorney for Plaintiff

(JUDICIAL DENIAL OF MOTION)

This Motion is insufficient as a matter of law and is denied. 10-17-89. Judge Patricia C. Fawsett

UNPUBLISHED ENDORSEMENT ON ONE PAGE MOTION

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

89-522-CIV-ORL-19

Johnnie Walker,

Plaintiff,

v.

FRITO-LAY, INC.,

Defendant.

Motion Filed Sept. 20, 1990
Motion Denied Oct. 2, 1990

PLAINTIFF'S MOTION FOR RECONSIDERATION OF RECUSAL

COMES NOW Plaintiff, by his attorney, and moves the Hon. Patricia C. Fawsett to reconsider her refusal to recuse herself, because of bias against him and his counsel evidenced by and through extrajudicial statements presented with an original motion for recusal, and herewith.

Such reconsideration is sought pursuant to Rule 60(b), F.R.Civ.P. Plaintiff, by his attorney, reserved the right to make this motion prior to the start of the trial in this matter. Plaintiff's attorney reiterated his desire for reconsideration of recusal, when, at the direction of Defendant's counsel, Judge Fawsett stopped questioning of a witness, and later barred her and two others from testifying altogether. The judge also excluded certain exhibits, not only for submission to the jury but from her own consideration on an employment discrimination claim based on Title VII of the Civil Rights Act of 1964. In fact, because of the judge's bias, Plaintiff was deprived entirely of a meaningful bench trial of the Title VII claim. See memo of law and affidavit herewith.

WHEREFORE, having no other remedy at law or in equity, Plaintiff seeks recusal of this judge so that a far (sic) may be had by an impartial Court at least on the Title VII claim.

Gabe Kaimowitz

Gabe Kaimowitz FL Bar #0633836
3173 Whisper Lake, #A, Winter Park, FL 32792 (407) 678-3713,
Attorney for Plaintiff

(JUDICIAL DENIAL OF MOTION)

Denied 10-2-90
Judge Patricia C. Fawsett

(UNPUBLISHED)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-3960
NO. 91-3287

D. C. Docket No. 89-522-CIV-Orl-19

JOHNNIE WALKER,
Plaintiff-Counterdefendant-Appellant,

versus

FRITO-LAY, INC.,
Defendant-Crossclaim Plaintiff-Appellee.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING

BEFORE: COX and BIRCH, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM: THE petition(s) for rehearing filed by the appellant is ***denied*** (STAMPED Feb. 28, 1992)
ENTERED FOR THE COURT by ***Emmett R. Cox***,
United States Circuit Judge

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
89-522-CIV-ORL-19

Johnnie Walker,

Plaintiff

v.

FRITO-LAY, INC.,

Defendant.

DISTRICT COURT DECISION FROM THE BENCH-
TRIAL TRANSCRIPT OF SEPTEMBER 6-7, 1990

Q. (By PLAINTIFF'S ATTORNEY): Mr. Walker, by that time had you filed a discrimination charge against the company? A. Yes, I did.

Q. Had you also applied for unemployment compensation benefits? A. Yes, I did.

Q. Had you been notified by that time by the Unemployment Compensation whether you would receive those benefits?

(DEFENDANT'S ATTORNEY): Objection, Your Honor, on the grounds previously stated in my motion. (A motion to exclude any mention or use of a unemployment compensation appeals decision or transcript made in limine was not resolved until trial.)

THE COURT: I'll sustain the objection...

THE COURT:....You started questioning Mr. Walker about whether he had already filed a claim for discrimination and the claim for unemployment benefits prior to this time. He had one other meeting.

(PLAINTIFF'S ATTORNEY): Right, Your Honor. Your Honor, we understand the decision in the case. The problem for us is as follows, we see no reason that either (written transcript or oral recording on which an unemployment compensation appeal decision was based) would be harmful. One, that the company at that time clearly went on record that one of the charges against Mr. Walker was intoxication. Secondarily, and later indicated in the same proceeding, that it was withdrawn

(the charge of intoxication). Secondarily, and critically for us is the date of the decision. However, not the decision itself, because we want to show that (a Defendant executive hearing Walker's final internal appeal) knew or had known at the time that he decided against Mr. Walker, that, in fact, the company already had lost the appeal with regard to the unemployment compensation. So, I was trying to get in, in some way, and I'm going to do it any agreeable way, simply the time sequence that the company had been apprised by the State of Florida that, in fact, their claim of misconduct had somehow been overruled.

THE COURT: I'll sustain the objection to the decision. It would appear to me that the charges of intoxication then thereafter being withdrawn in a separate administration action by Worker's Compensation (sic) isn't at this point, relevant, but it may be something that you need to bring out on rebuttal depending on the position that's taken by the Defendant.

(UNPUBLISHED)

FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY UNEMPLOYMENT COMPENSATION APPEALS BUREAU, ORLANDO, FLORIDA

Docket No. 88-19357U

Nov. 10, 1988, Service by Mail Nov. 14, 1988

NOTICE OF DECISION OF APPEALS REFEREE

JURISDICTION: 443.151 (4)(a) & (b) F.S.

CLAIMANT/APPELLANT	) EMPLOYER
	)
S.S. No. 264-21-1416	) No. -0006846-
JOHNNIE K. WALKER	) FRITO-LAY, INC. &
5020 Rosamond Dr., #2604	) GATES, McDONALD
Orlando, FL #32808	) P.O. Box1944 Co-
	) lumbus, OH 43216

CLAIMANT'S REPRESENTATIVE	EMPLOYER SITE:
GABE KAIMOWITZ	FRITO-LAY, INC.
3173 Whisper Lake, #A	2800 Silver Star
Winter Park, FL 32792	Orlando, FL 32808

Other copies mailed to: UCCO 3632-0

APPEARANCES: Claimant - YES Employer - YES

IMPORTANT: This decision will become final unless within 20 calendar days after the date it is mailed you file an application for review to the Unemployment Appeals Commission, Room 221, Ashley Building, 1321 Executive Center Drive, East, Tallahassee, FL 323899-0681.

ISSUES INVOLVED: SEPARATION: Whether claimant voluntarily left work without good cause; provided that good cause shall include such cause as is attributable to the employing unit or consists of illness or disability of the individual requiring separation; or was discharged for misconduct connected with work, and if appropriate, the number of weeks the claimant is disqualified from receipt of benefits as provided in Sections 443.101 (1) and 443.036(26), Florida Statutes, and Florida Administrative Code Rule 38B-2.17.

CHARGES TO EMPLOYER'S EMPLOYMENT RECORD: Whether the benefit payments made to claimant

shall be charged to the employment record of the employer as provided in Section 443.101(9) and 443.131(3)(a), Florida Statutes, and Florida Administrative Code Rule 38B-2.06.

FINDINGS OF FACT: The claimant became employed on September 5, 1978, as a potatoe (sic) inspector, by employer (-0006846-8), that packages and distributes snack food items. During the course of this employment, the claimant worked as a sanitation helper, processing utility worker and packaging technician. In 1988, the claimant's hours of work were from 3:30 p.m. until midnight. On September 3, 1988, the claimant reported for work at his usual time and as this was a shutdown shift, it would be over before midnight. Around 10:30 p.m. that evening, the claimant stopped operating the packaging machine, as the work was finished and he then proceeded to clean up his area, after which

he headed for the time clock. After punching his time card, he then went out into the parking lot and proceeded over to a white car which belonged to a co-worker, as he had promised her that he would drive it across the street and put air in the tires. The production manager, who was in his office, observed the claimant in the parking lot and driving off. A few moments later, the claimant returned and the production manager watched him go into the packaging department. The production manager then left his office and was on his way to the packaging department when the claimant nodded a greeting to him as they were not close enough to talk. The production manager noticed the claimant stopping at the time card rack and pulling one out. The claimant earlier, when he was at the time clock, overlooked tallying up the number of hours that he had worked in that week and had returned to do so. On September 6, 1988, the claimant was informed that he had been seen

leaving without punching his time card out. The claimant denied that he left the employer's premises without punching out. However, he was informed that he was being suspended pending investigation. On September 8, 1986, the claimant was informed that his services were terminated.

CONCLUSIONS OF LAW: The law provides that an individual who has been discharged for misconduct connected with the work shall be disqualified from receiving benefits. "Misconduct connected with the work" means conduct evincing such willful or wanton disregard of an employing unit's interests as is found in deliberate violation or disregard of standards of behavior which the employing unit has a right to expect of its worker; or carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of the employing unit's interests or of the worker's duties and obligations to the employ-

ing unit.

The record and evidence in this case clearly show that the claimant was discharged by his employer on September 8, 1988. It is further shown that this discharge occurred because allegedly the claimant left the employer's premises without punching out and by so doing falsified his time card. The claimant in his testimony was adamant that he did not leave the employer's premises without first punching his time card and under such circumstances his action (sic) were not in deliberate disregard of the employer's interest. On the other hand assuming that the employer's contention is correct at most it can be said that it was due to an inadvertence on the claimant's part and in such (sic) an isolated incident of misconduct does not serve to disqualify him from receiving unemployment compensation benefits.

Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inab-

ility or incapacity, inadvertence or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute. Tucker v. Florida Department of Commerce, 366 So.2d 845 (Fla. 1st DCA 1979). It therefore follows that the claimant was discharged but not for misconduct connected with his work within the meaning of the law.

DECISION: The claims adjudicator's determination dated October 7, 1988 is hereby reversed.

A. J. Winewico

A. J. Winewico, Appeals Referee
Orlando, Florida, November 10, 1988

This is to certify that a copy of the above decision was mailed to the last known address of each interested party on November 14, 1988.

By *F. Allison*
Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
Case No. 88-962-CIV-ORL-19

COMMITTEE OF ORGANIZED GROUPS ("COG"), ET AL.,
Plaintiffs,

v.

THE CITY OF ORLANDO, FLORIDA ("CITY"), et al.,
Defendants.

Granting of Recusal, Oct. 31, 1988

ORDER

This cause came before the Court on Plaintiffs' Renewal of Motion for Recusal of Resident Judges (Doc. No. 8, filed October 31, 1988) and Plaintiff's Motion for Recusal October 26, 1988).

In Plaintiffs' Motion for Recusal of Resident Judge (sic), Plaintiffs moves (sic) for recusal; of the undersigned Judge pursuant to 42 U.S.C. § 455 because she had recused or disqualified herself in two other civil actions pending before the Court involving Plaintiff's Attorney, Gabe

Kaimowitz. In Plaintiffs' Renewal Motion of Recusal of Resident Judges, Plaintiffs allege:

"12. Finally, in the second case in which Judge Sharp recused himself involving Kaimowitz, action has been taken by the attorney to disassociate himself from the Florida Bar. Judge Sharp is a member with a fiduciary interest in that outcome. The Middle District of Florida pays particular heed to the views of the Florida Bar. (See notice herewith.)

Hon. Patricia Fawsett

13. Recusal also is sought of the Hon. Patricia Fawsett for the reasons stated in Points #12 an #13 (sic)."

In Plaintiffs' Memorandum of Law in Support of Renewal of Motion for Recusal of Resident Judges and Motion for a TRO (Doc. No. 10, filed October 31, 1988, Plaintiffs assert at page 4:

"While Judge Fawsett is not said to have such a personal bias, her recusal is required here since she has disqualified herself from two pending cases involving her former law partner and Plaintiffs' attorney here. In one, the same City

Defendant herein is involved and in the other The Florida Bar is implicated. Judge Fawsett served as an active member of The Florida Bar until 1985-86 when she was appointed to the federal bench. Need for her disqualification here is obvious if the appearance of justice is to be served, as described in Liljeberg, supra."

While no bias or prejudice of the undersigned Judge actually exists, and Plaintiffs' allegations are insufficient as a matter of fact to require recusal, the undersigned Judge will recuse herself in this matter in order to avoid the appearance of impropriety or partiality.

This case shall be forwarded to the Chief Judge of the United States District Court for the Middle District of Florida for reassignment.

DONE AND ORDERED at Orlando, Florida this 31st day of October, 1988.

Patricia C. Fawsett

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUL 24 1992
OFFICE OF THE CLERK

No. 91-2073

In The

Supreme Court of the United States

October Term, 1992

JOHNNIE WALKER,

Petitioner,

vs.

FRITO-LAY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

SUSAN MCKENNA
GARWOOD & MCKENNA
322 East Pine Street
Orlando, Florida 32801
(407) 841-9496

EDMUND M. KNEISEL
Counsel of Record
JEFFREY A. VAN DETTA
KILPATRICK & CODY
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309
(404) 815-6500

Attorneys for Respondent

2333
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by the Court are more appropriately stated as follows:

1. Should the Supreme Court grant certiorari and remand to the court of appeals for an academic discussion of the retroactivity of the Civil Rights Act of 1991 where, as here, a jury has already rejected Petitioner's claims, including his claims for punitive and compensatory damages, and he accordingly has been afforded all the substantive and procedural rights allowed by that statute?

2. Should the Supreme Court grant certiorari to review Petitioner's recusal arguments that were presented in three separate motions in the trial court and rejected as meritless by that court and by the United States Court of Appeals for the Eleventh Circuit?

SUBSIDIARIES AND AFFILIATES OF FRITO-LAY, INC.

The list of subsidiaries of Respondent Frito-Lay, Inc. provided in the Petition in note 1 at pages iii-viii is substantially correct except that the following subsidiaries and affiliates were omitted from that list:

FL Holdings, Inc.

Frito-Lay Holdings Ltd.

General Cinema Beverages Ltd. of California, Inc.

MBA Grand Rapids Co.

Pepsi-Cola Bottling Company of Perry, Inc.

Pepsi-Cola Equipment Corp.

Pepsi-Cola Far East Trade Development Co., Inc.

Pepsi-Cola Interamericana, S.A.

Pepsi-Cola International Ltd.

Pepsi-Cola International Ltd. (U.S.A.)

Pepsi-Cola Mamulleri Ltd. Sirketi

Pepsi-Cola Metropolitan Bottling Company, Inc.

Pepsi-Cola Panamerica, S.A.

Walker's Crisps Holdings Ltd.

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No. 91-2073

In The

Supreme Court of the United States

October Term, 1992

JOHNNIE WALKER,

Petitioner,

vs.

FRITO-LAY, INC.,

Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Frito-Lay, Inc., respectfully requests this Court to deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Middle District of Florida in favor of Respondent and against Petitioner.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in this action was not published. A copy of this Opinion is contained in the Appendix to the Petition at pages la-2a, and reference to the Eleventh Circuit's memorandum affirmance appears in the table published at 952 F.2d 410 (11th Cir. 1992). A copy of the jury's unanimous verdict in favor of Respondent in this case, dated September 12, 1990, was not published. A copy of the jury's verdict form is attached hereto as Exhibit "A" of Respondent's Appendix. The district court's findings of fact and conclusions of law based upon the jury's verdict, entered on September 21, 1990, are published at 56 Fair Empl. Prac. Cases (BNA) 971 (M.D. Fla. 1990). A copy of the district court's findings and conclusions is also contained in the Appendix to the Petition at pages 5a-25a. The district court's order entered March 18, 1990, granting a motion to compel Petitioner to order additional portions of the trial transcript for his appeal and denying Petitioner's post-trial motion for judicial reassignment, was not published. A copy of that Order is attached hereto as Exhibit "B" of Respondent's Appendix.

STATEMENT OF THE CASE

Petitioner Johnnie Walker commenced this action against Respondent Frito-Lay, Inc., by filing a complaint on June 19, 1989, alleging violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"). Claiming that he had been discharged in 1988 because of his black race, Petitioner sought punitive damages and compensatory damages for emotional pain and suffering and demanded trial by jury. Respondent defended this action on the grounds that Petitioner had been terminated for the legitimate, nondiscriminatory reason that he had violated a work

rule prohibiting employees from leaving Respondent's Orlando, Florida plant without clocking out first.

Before trial, Respondent filed a motion to strike Petitioner's jury demand, arguing, *inter alia*, that Section 1981, as interpreted in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), did not encompass claims for alleged discriminatory termination of employment. (R1-32).[1] Petitioner vigorously opposed this motion, arguing that a trial by jury was appropriate on his Section 1981 claim and on his claim under Title VII. (R1-36). At the opening of the trial, the trial judge announced that she would reserve ruling on the motion to strike, noting that if the motion were later granted, the jury's verdict would be treated as advisory pursuant to Fed. R. Civ. P. 39(c).[2] The case was tried before a jury on September 6-12, 1990. At the conclusion of the trial, the court submitted the case to the jury on a special verdict form prepared jointly by the parties. (R2-46; R2-49; R2-50).

Petitioner's Title VII and Section 1981 claims involved identical issues of fact on the issue of liability, which was addressed in question 1 of the special verdict form.[3] Questions 2-4 addressed Petitioner's claims for back pay, compensatory damages and

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[1] The designation "R" followed by a series of three numbers refers to the volume number, document number, and page number of the appellate record where support for the immediately preceding statements can be found.

[2] This bench ruling is reproduced in the excerpts of the trial transcript included as Exhibit "C" of Respondent's Appendix. With the exception of this ruling and one jury charge, also included as part of Exhibit "C", Petitioner did not order a transcript of most of the jury proceedings. He did not order a transcript of the charge conference, the court's charge to the jury (with one exception), or all the colloquy between counsel and the court about the jointly prepared form of special verdict.

[3] Question 1 reads as follows: "Do you find from a preponderance of the direct or circumstantial evidence that Defendant discharged Plaintiff Walker intentionally because of his black race?" (Respondent's Appendix, Exhibit "A").

punitive damages. Because the jury returned a verdict for Respondent by answering "no" to the liability question, the jury did not need to answer any of the damages questions. (R2-47; R2-49; R2-50).

After the jury returned its verdict and was excused, the district judge announced that Respondent's motion to strike Petitioner's jury demand would be granted and that she would prepare post-trial findings of fact and conclusions of law that were consistent with the jury's verdict. The post-trial findings of fact and conclusions of law were entered September 21, 1990. The district court ruled in favor of Respondent on the merits of Petitioner's Title VII claim and dismissed the Section 1981 claim under the authority of *Patterson, supra.*

After accurately summarizing the pertinent evidence about the circumstances of plaintiff's discharge, the court made the following factual finding:

> Defendant's managerial employees thoroughly and carefully researched the case before terminating plaintiff. The evidence supports the conclusion of defendant's managerial employees that *Plaintiff willfully, knowingly, and deliberately violated a work rule and then lied to try to conceal his action when he was caught.* His actions constitute falsification of his time card and leaving the work premises prior to clocking out.

(R2-51-9) (emphasis added). In making this determinative credibility finding, the trial judge described numerous inconsistencies (revealed during Petitioner's testimony on cross-examination) between his trial testimony and his previous deposition testimony. (R2-51-3-4, 7, 8). In addition, the court

specifically rejected as a physical impossibility Petitioner's claim that he had clocked out before he left the premises rather than after he returned from his errand.[4] (*See* R5-72-24-26, 29-30, 35-36, 39, 41, 43-45, 80-81, 88; R6-73-104-105, 111-118).

The trial court also rejected Petitioner's pretext claim because there was no evidence of disparate treatment based on race in Respondent's enforcement of the work rule. Petitioner's only evidence of alleged disparate treatment involved Marc Ann Drake, a former employee who had been reprimanded in 1984 for violating the time-clock rule. Ms. Drake, who was called as a witness by Petitioner, testified that she did not know that the Company rules prohibited her leaving the plant for a snack without clocking out.[5] Soon thereafter, all employees were notified about the rule by a posted memorandum and advised that it would be strictly enforced. (R-2-51-5, 14-15).[6]

Mr. Irving Matthews — the plant manager who made the decision to discharge Petitioner — had nothing to do with the handling of the Marc Ann Drake incident because it occurred in 1984, several years before Mr. Matthews came to the plant. (*See* R5-72-39-41; R6-73-122). Mr. Matthews, who is black, testified

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[4] Beginning with the post-termination, internal appeal of his discharge, Petitioner has continuously claimed (untruthfully) that he clocked out before he left the plant. He also claimed that the Company manager who had seen Petitioner in the parking lot before the clock-out time stamped on his time card had lied or was mistaken about the incident. (*See* R2-51-4; R4-71-10; R6-117-117).

[5] Ms. Drake's testimony was so damaging to his case that Petitioner did not even include it in the transcript excerpts ordered for the appeal. Indeed, Petitioner omitted a substantial portion of the trial evidence from the transcript, including his own cross-examination testimony and most of the testimony presented during Respondent's portion of the case.

[6] A copy of this posted memorandum, tendered and admitted at trial as Defendant's Exhibit 3, is reproduced as Exhibit "D" of Respondent's Appendix.

without contradiction that during his tenure as Plant Manager the time-clock rule had been strictly enforced. (R5-72-39-40). The trial court found that after the work rule was "publicly posted" in 1985, all the employees (two blacks, including Petitioner, and three whites) who knowingly violated the rule had been terminated. (R2-51-15 n. 11).

Final judgment was entered in this case on September 21, 1991. (R2-52). Shortly thereafter, Petitioner filed a motion for reconsideration of his pretrial motions for recusal of the trial judge[7] and a motion for a new trial (or "bench trial") on plaintiff's Title VII claim. (R2-53; R2-54; R2-55). The district court denied those motions on October 3, 1990, (R2-53; R2-55), and Petitioner filed a timely notice of appeal on October 19, 1990. (R2-58).

Petitioner did not order the trial transcript until after the Clerk of the Court of Appeals directed him to do so. Even then, Petitioner's transcript order omitted substantial portions of the trial testimony and most of the rulings by the trial judge pertinent to the jury trial issues. *See* notes 2 and 5, *supra*. As a result, pursuant to Fed. R. App. p. 10(b)(3), Respondent filed a motion to compel Petitioner to order additional portions of the trial transcript necessary to a full review of the case on appeal. (R7-76). The trial court granted this motion,[8] but Petitioner never ordered a complete

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[7] In Petitioner's initial complaint and again by separate motion and affidavit filed September 28, 1989, Petitioner sought recusal of Hon. Patricia C. Fawsett (as well as Hon. Kendall G. Sharp, the other district judge resident in Orlando) for alleged bias against Petitioner's attorney and against the Committee of Organized Groups ("COG"), of which Petitioner claimed to be a member. (R1-1-11; R1-6-1; R1-7-1). The district court denied the pretrial recusal motion as "insufficient as a matter of law." (R1-6-1).

[8] In the same order, the district court also denied Petitioner's third motion for recusal, styled as motion for "judicial reassignment." (R7-76). This order is reproduced in Respondent's Appendix as Exhibit "B".

transcript.[9] Instead, he filed a notice of supplemental appeal. (R7-79).

In his brief to the Eleventh Circuit, Petitioner challenged the trial court's factual findings, credibility findings, various evidentiary rulings, and denial of his recusal motions. The fragmentary, incomplete trial transcript ordered by Petitioner did not support his arguments or contradict any of the district court's factual findings or evidentiary rulings. Petitioner also failed to support his recusal arguments by identifying any factual basis for questioning the district judge's impartiality. The appellate record does not contain the slightest hint of bias, prejudice, or partiality by the judge against Petitioner or his counsel. On February 28, 1992, the Eleventh Circuit affirmed the judgment and orders of the district court.

SUMMARY OF THE ARGUMENT

Petitioner's claims for discriminatory discharge under Section 1981 and Title VII have already been tried to a jury. The jury rejected Petitioner's claims by answering question 1 on the special verdict form in the negative. Petitioner has already received every procedural entitlement incorporated in the jury trial and damages amendments to Title VII and Section 1981 enacted as part of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991) ("the 1991 Act"). Thus, even if this Court held that the

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[9] Because the trial transcript omits substantial portions of the trial proceedings, the appeal could have been dismissed on that ground. *E.g., Thomas v. Computax Corp.*, 631 F.2d 139, 141 (9th Cir. 1980); *Battrud v. Town of Exline*, 628 F.2d 1098, 1099 (8th Cir. 1980); *see* Fed. R. App. P. 3(a). In any event, in the absence of a complete transcript, no error may be predicated on the court's rulings or findings. *See, e.g., Green v. Aetna Ins. Co.*, 397 F.2d 614, 618-19 (5th Cir. 1968); *Fischer v. Dallas Fed. Sav. and Loan Ass'n*, 835 F.2d 567, 568 (5th Cir. 1988); *Ewers v. Board of County Comm'rs*, 802 F.2d 1242, 1250 (10th Cir. 1986), *cert. denied*, 484 U.S. 1008 (1987).

1991 Act were fully retroactive and applied to claims arising more than two years before its passage, the result in this case would be to remand for entry of final judgment for Respondent in accordance with the jury's verdict.

Similarly, Petitioner's recusal claim has already been rejected as meritless by four federal judges (including the trial judge) and should not be reviewed by this Court. Petitioner has failed to identify any factual basis whatsoever for questioning the trial judge's impartiality, and there is not the slightest hint of bias, prejudice, or partiality in the appellate record.

Accordingly, neither the issue of the 1991 Act's retroactivity nor the issue of recusal warrants review on certiorari in this case.

REASONS FOR DENYING THE PETITION

I.

THIS CASE SHOULD NOT BE REMANDED TO CONSIDER THE RETROACTIVITY OF THE CIVIL RIGHTS ACT OF 1991 BECAUSE A RULING ON THAT ISSUE COULD NOT AFFECT THE OUTCOME OF THE CASE.

Petitioner contends that this case should be remanded to the Eleventh Circuit for consideration of the issue of retroactivity of the Civil Rights Act of 1991. There is no basis whatsoever for such a remand because Petitioner's claims, including his claims for compensatory and punitive damages, have already been rejected by a jury. Petitioner would not be entitled to a new jury trial under the 1991 Act even if it were fully retroactive.

In essence, Petitioner argues that because the trial judge entered post-trial findings of fact and conclusions of law that treated the jury's verdict for Respondent as "advisory" rather than binding, the case must be remanded for a new jury trial. Before trial, Respondent had moved to strike Petitioner's jury demand, but the trial court deferred ruling on this motion and the case was fully tried to a jury. Neither the jury nor counsel for the parties were told that the jury would be advisory. *See* note 11, *infra*. After being appropriately instructed on applicable legal principles, the jury returned a verdict by finding specifically that Respondent had not engaged in intentional racial discrimination. *See* note 3 and accompanying text, *supra*.

Petitioner's meritless claims have already been rejected by one jury, and he is not entitled to present those same claims to another jury. Under the well-established harmless error rule, the Court disregards any error or defect which does not affect the substantial rights of the parties. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553-54 (1984); 28 U.S.C. § 2111 (1988). Thus, even "if there was any error in treating the jury's verdict as advisory and concurring therein, such error would be harmless" because Petitioner's claims were fully tried to the jury as if it were a jury of right. *Pennsylvania Thresherman & Farmers' Mut. Casualty Ins. Co. v. Crapet*, 199 F.2d 850, 853 (5th Cir. 1952) (no error where court decided to treat jury's verdict as advisory after verdict had been returned); *see also First Nat'l Bank v. National Airlines, Inc.*, 288 F.2d 621, 623 (2d Cir.) (no prejudice to party contending that it was denied right to jury determination of issue when issue submitted to advisory jury), *cert. denied*, 368 U.S. 859 (1961); 28 U.S.C. § 2111 (1988).

No purpose could be served by remanding this case for a determination of whether the 1991 Act should be applied retroactively because the results of that determination would not

alter the substantive outcome of the case.[10] For example, in situations in which a jury's verdict is not conclusive, but the trial court enters a final judgment without issuing separate findings of fact and conclusions of law as required by Fed. R. Civ. P. 52, the remedy is not to remand the case for a new trial. Instead, the issuance of post-judgment findings and conclusions is permitted to avoid any necessity for remand and a second appeal. *Evans v. Lockheed-Georgia Co.*, 33 Empl. Prac. Dec. (CCH) ¶34,009 (N.D. Ga.) (to prevent piecemeal appeal, court may enter findings of fact and conclusions of law pursuant to Rules 52 and 39(c) of Fed. R. Civ. P. after entry of judgment on jury's verdict), *aff'd mem.*, 721 F.2d 821 (11th Cir. 1983), *cert. denied*, 469 U.S. 980 (1984); *see Gibbs v. Buck*, 307 U.S. 66 (1939); *Johnson v. Heyd*, 415 F.2d 1005 (5th Cir. 1969); *Reinstine v. Rosenfield*, 111 F.2d 892 (7th Cir. 1940). Likewise, if the trial court here erred in its post-verdict legal rulings, any such error has only technical, rather than substantive, effect. The only remedial action that could conceivably be required is for the trial court to enter final judgment on the jury's verdict for Respondent. There is no basis for the court of appeals to reconsider the merits of the jury trial.[11]

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[10] The same proposition applies to Petitioner's meritless argument that the ruling in *Patterson*, *supra*, should *not* be retroactively applied. Indeed, in its findings and conclusions, the court noted that it was precisely because of the unsettled state of the law after *Patterson* that it submitted Petitioner's § 1981 claim to the jury. The court noted that this approach would "avoid the necessity for a new trial should this Court's legal ruling [dismissing the § 1981 claim] be reversed on appeal." (*See* Petitioner's Appendix, p. 21a).

[11] Petitioner vigorously opposed Respondent's motion to strike Petitioner's jury demand and did not object when the district court reserved ruling on that motion and announced that the case would be tried to a jury, whose verdict *might be* treated as advisory if the court later decided to grant the motion. *See* Respondent's Appendix, Exhibit "C". As a result, Petitioner has clearly waived any right to complain of the adverse jury verdict. *See generally, Stockton v. Altman*, 432 F.2d 946, 949-50 (5th Cir. 1970) (jury verdict treated as binding against party who did not object to jury at trial but contended on appeal that issues tried were equitable in nature and jury's verdict should be advisory), *cert. denied*, 401 U.S. 994 (1971); *Kelly v. Shamrock Oil & Gas Co.*, 171 F.2d 909, 911 (5th Cir. 1948) (party who demanded jury trial could not contend on appeal that case should not have been tried to jury), *cert. denied*, 337 U.S. 917 (1949); Fed. R. Civ. P. 39(c).

For the foregoing reasons, none of the recent cases that this Court has remanded for consideration of the retroactivity of the 1991 Act supports a remand here. For example, in *Holland v. First Virginia Banks, Inc.*, 744 F. Supp. 722, 723 n. 1 (E.D. Va. 1990), the plaintiff's Section 1981 claim for racially discriminatory discharge was tried to a jury, which returned a verdict in the plaintiff's favor. The Fourth Circuit reversed, apparently on the ground that *Patterson* barred such claims. 937 F.2d 603 (4th Cir. 1991). Obviously, if the 1991 Act applies retroactively to the claims in *Holland*, the jury's verdict in favor of the plaintiff should be reinstated. Accordingly, this Court granted certiorari, vacated the judgment, and remanded the case to the Fourth Circuit for a ruling on the outcome-determinative retroactivity issue. ____ U.S. ____, 112 S. Ct. 1152 (1992).

In *Hicks v. Brown Group, Inc.*, 946 F.2d 1334 (8th Cir. 1991), the Eighth Circuit reversed a jury verdict for the plaintiff on his Section 1981 discriminatory discharge claim. *See* 902 F.2d 630, 634-35 (8th Cir. 1990), *vacated and remanded*, ___ U.S. ___, 111 S. Ct. 1299 (1991). This Court remanded the case for further consideration in light of the 1991 Act. ____U.S. ____, 112 S. Ct. 1255 (1992). Once again, a ruling on the retroactivity issue would be outcome determinative. In contrast to *Hicks* and *Holland* the jury in this case returned a verdict for Respondent; therefore, a remand for consideration of the retroactivity issue would be pointless.[12]

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[12] Every Court of Appeals that has ruled on the issue has held that the 1991 Act is not retroactive. *E.g., Fray v. Omaha World Herald*, 960 F.2d 1370 (8th Cir. 1992); *Vogel v. Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Mozee v. American Commercial Marine Serv. Co.*, 58 Fair Empl. Prac. Cases (BNA) 1201 (7th Cir. May 7, 1992). Among the many district courts that have considered the issue, "[t]here is great confusion as to whether [the Act] is retroactive." *Ekandem v. District of Columbia*, 58 Empl. Prac. Dec. (CCH) ¶41,413, at 70,510 (D.D.C. Apr. 10, 1992). At least one district court has resolved this confusion by convening an advisory jury to try a Title VII claim in a case filed before the effective date of the Act. *Id.*

Similarly, Petitioner's reliance upon *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565 (D.C. Cir. 1991), *cert. granted, vacated, and remanded*, ____ U.S. ____, 112 S. Ct. 960 (1992), is misplaced. The plaintiff's claim in that case was dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Obviously, *Gersman* does not support the remand of a case for a new jury trial when the plaintiff has already had a jury reject his claim on the merits.

This Court has recently stated that "[a] principal purpose for which [it] use[s] . . . certiorari jurisdiction . . . is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, ____ U.S. ____, 111 S. Ct. 1854, 1857 (1991); *see* Sup. Ct. R. 10.1. This Court does not employ certiorari jurisdiction to issue advisory opinions that are not determinative of the outcome of the case. Because a ruling on the retroactivity of the 1991 Acts would not affect the outcome of the appeal, the Petition should be denied.

II.

PETITIONER'S MERITLESS RECUSAL CONTENTIONS DO NOT PROVIDE A BASIS FOR ISSUANCE OF A WRIT OF CERTIORARI IN THIS CASE.

Petitioner also argues that this Court should review the rulings denying his motions for recusal of "federal judges resident in Orlando." Petitioner's meritless recusal arguments have already been rejected by the trial judge and three circuit judges because Petitioner has never shown the existence of the slightest hint of personal bias, prejudice, or partiality against him by the trial judge. Petitioner's meritless contentions are obviously not an appropriate issue on which to grant certiorari.[13]

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[13] For example, although Petitioner points to the fact that the trial judge recused herself in a previous case involving his trial counsel and "COG," of which he is a member, it is well established that a judge's voluntary recusal in a prior case does not require recusal in a subsequent case, even involving the same party. *E.g., United States*

(Cont'd)

Petitioner argues at length that the trial judge's bias is evidenced by her evidentiary rulings about Petitioner's state-law claim for unemployment benefits. It is well established, however, that "adverse rulings or mere error [by the trial judge] . . . is an insufficient basis for recusal." *United States v. IBM Corp.*, 539 F. Supp. 473, 478-79 (S.D.N.Y. 1982); *United States v. Schwartz*, 535 F.2d 160, 165 (2d Cir. 1976), *cert. denied*, 430 U.S. 906 (1977).

In any event, no bias could possibly be inferred from those rulings because the appellate record does not show any error regarding the unemployment compensation appeals proceedings. For example, the record does not show exclusion of a transcript of a tape-recorded unemployment compensation appeals hearing "for any and all purposes," as Petitioner misleadingly states. (Petition, p. 20). When counsel for Petitioner initially tendered the transcript, he failed to present any foundation for its admission. The trial judge explained that he might be able to bring up the unemployment compensation appeal at a later stage in the case and that "[i]t may be more relevant then, but just on the record at this point, I do not feel that [the transcript] should come in on this record." (R4-71-40). Counsel never attempted to tender the unemployment

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(Cont'd)

v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987). Likewise, Petitioner's (unsupported) allegations of alleged animosity towards his trial counsel are irrelevant. *E.g., Davis v. Board of School Comm'rs*, 517 F.2d 1044, 1050 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The record is utterly devoid of evidence of any such animosity. Further, Petitioner's allegations concerning rumors his trial counsel heard about the trial judge's animosity towards civil rights plaintiffs is simply irrelevant to the existence of bias against Petitioner personally and thus provide no basis for recusal. *See Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1020 (5th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982); *Vietnamese Fishermens Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 1017, 1019-20 (S.D. Tex. 1981). Petitioner's reliance on *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), is misplaced because the Court there merely held that recusal was warranted where the trial judge was also a trustee of a university that had a direct financial interest in the outcome of the trial.

compensation appeal transcript again, and he did not call any witness who could authenticate that transcript or who could be impeached by its contents. *See, e.g., United States v. Biggins*, 551 F.2d 64, 66 (5th Cir. 1977) (authentication of tape recordings required as prerequisite to admissibility).

Similarly, the trial court did not display any bias in excluding the unemployment compensation award from evidence. The only issue considered in that award was whether Petitioner was barred from receiving unemployment compensation benefits under Florida law because he had been discharged for misconduct constituting "willful or wanton disregard" of his employer's interests, *see* Fla. Stat. Ann. § 443.001, *et seq.* (West 1981). (Petitioner's Appendix, pp. 42a-43a). The appeals referee did not make any finding on the issue of whether or not Petitioner had clocked out before leaving the plant premises. Instead, the referee ruled that any violation of the time-clock rule was "an isolated incident of misconduct [that] does not serve to disqualify [Petitioner] from receiving unemployment compensation benefits." (*Id.* at 43a).

Unemployment compensation awards should be admitted into evidence only when the award contains a factual finding of misconduct "clearly relevant to a charge that an employee has been fired not for any proper reason but because of racial discrimination." *Barfield v. Orange County*, 911 F.2d 644, 650-51 n.7 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2263 (1991). Where, as here, an administrative award does not contain any such finding, it is properly excluded. *Id.* at 650 (decision to admit or exclude administrative reports should be left to "the sound discretion of the district court"); *see, e.g., Mitchell v. Bendix Corp.*, 603 F. Supp. 920, 921-22 (N.D. Ind. 1985) (granting motion to strike allegations regarding outcome of unemployment compensation proceedings as irrelevant in Title VII action); *see also McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1259 (10th

Cir. 1988) (affirming district court's exclusion of arbitrator's written opinion as misleading and prejudicial in Title VII action because it did not address issue of discrimination); *Pollard v. Rea Wire Magnet Co.*, 824 F.2d 557 (7th Cir. 1987), *rev'g* 674 F. Supp. 645, 652-54 (N.D. Ind. 1986) (reversing district court's finding of pretext in Title VII action where court had relied, in part, on unemployment compensation ruling), *cert. denied*, 484 U.S. 977 (1987). Accordingly, Petitioner's meritless, unsupported recusal arguments, like his wholly abstract arguments about the retroactivity question, do not present any issue appropriate for review on certiorari.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

EDMUND M. KNEISEL
Counsel of Record
JEFFREY A. VAN DETTA
KILPATRICK & CODY
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309
(404) 815-6500

SUSAN K. MCKENNA
GARWOOD & McKENNA, P.A.
322 East Pine Street
Orlando, Florida 32801
(407) 841-9496

Attorneys for Respondent

APPENDIX

EXHIBIT A — SPECIAL VERDICT FORM

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 89-522-CIV-ORL-19

JOHNNIE WALKER,

Plaintiff,

v.

FRITO-LAY, INC.,

Defendant.

VERDICT

I. ON THE ISSUE OF LIABILITY

1. Relating to Racial Discrimination Against Plaintiff Walker.

Do you find from a preponderance of the direct or circumstantial evidence that Defendant discharged Plaintiff Walker intentionally because of his black race?

Yes _____ No ___X___

If you answer "No" to this Question, please skip to Part III and answer Question 6. If you answer "Yes" to this question, then you should also answer the remaining questions on damages under Part II below and Question 6 under Part III.

II. ON THE ISSUE OF DAMAGES

2. Relating to Plaintiff Walker's Compensatory Damages

(a) Do you find from a preponderance of the evidence that Plaintiff Walker is entitled to recover compensatory damages for lost wages and other job-related benefits?

Yes _____ No _____

(b) If you answer "Yes," then state the amount of Plaintiff Walker's compensatory damages: $_____.

3. Relating to damages for Emotional Pain and Suffering

(a) Do you find from a preponderance of the evidence that Plaintiff Walker is entitled to recover monetary damages for emotional pain and suffering?

Yes _____ No _____

(b) If you answer "Yes," then state the amount of Plaintiff Walker's damages for emotional pain and suffering:

$_____

4. Relating to Plaintiff Walker's Punitive Damages

(a) Do you find from a preponderance of the evidence that Plaintiff Walker is entitled to recover punitive damages?

Yes _____ No _____

(b) If you answered "Yes," then state the amount of Plaintiff Walker's punitive damages: $_____

5. Relating to Plaintiff Walker's Duty to Mitigate or Reduce His Damages:

(a) Do you find from a preponderance of the evidence that Plaintiff Walker exercised reasonable diligence to mitigate or reduce his alleged compensatory damages by seeking, obtaining, and retaining other, comparable employment after the end of his employment with Frito-Lay, Inc.?

Yes _____ No _____

(b) If you answer "No," then state the amount by which Plaintiff Walker's compensatory damages should be reduced:

$_____

III. ON THE ISSUE OF DEFENDANT'S COUNTERCLAIM

6. Do you find from a preponderance of the evidence that the Defendant is entitled to recover from the Plaintiff the amount of $303.40 for vacation pay?

Yes _____ No __X__

We, the Jury, are unanimous in answering the above Questions based on a preponderance of the evidence, and hereby return our verdict accordingly.

SO SAY WE ALL.

Dated this 12th day of September, 1990.

/s/ L.G. Carlson
Foreperson

EXHIBIT B — ORDER ENTERED MARCH 18, 1991

UNITED STATES DISTRICT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 89-522-CIV-ORL-19

JOHNNIE WALKER,

Plaintiff,

v.

FRITO-LAY, INC.,

Defendant.

ORDER

This cause was considered upon the following matters:

1. Plaintiff's Motion to Set Aside Taxing of Costs by the Clerk and Memorandum in Support thereof (Doc. Nos. 61 and 62, filed October 30, 1990) and Defendant's Brief in Opposition to Plaintiff's Motion to Set Aside Taxing of Costs by the Clerk (Doc. No. 63, filed November 13, 1990).

Plaintiff's Motion to Set Aside Taxing of Costs by the Clerk (Doc. No. 61) is DENIED.

2. Defendant's Motion to Compel Plaintiff to Order

Additional Portions of Trial Transcript and Brief in Support thereof (Doc. Nos. 66 and 67, filed January 7, 1991) and Plaintiff's Memorandum in Opposition to Motion to Compel Plaintiff to Order Additional Portions of Trial Transcript (Doc. No. 68, filed January 24, 1991).

Rule 10(b)(3) of the Federal Rules of Appellate Procedure provides that if the appellant orders only a partial transcript, he is required to provide the appellee with a statement of the issues to be presented on appeal. The appellee may then designate additional portions of the record to be included in the record on appeal. If the appellant does not order these additional parts of the transcript, the appellee may either order the parts or move the district court for an order requiring the appellant to order them.

In the instant case, Plaintiff, the appellant, ordered a partial transcript but failed to provide Defendant with a statement of the issues presented on appeal. Nevertheless, Defendant did its best to determine the issues on appeal by reviewing the parts of the transcript ordered by Plaintiff and Plaintiff's Motion for New Trial. Defendant then served on Plaintiff a "Designation of Additional Portions of Trial Transcript For Plaintiff-Appellant to Order" (Doc. No. 64). Plaintiff has not ordered these portions of the transcript nor otherwise responded to Defendant's designation. Defendant moves this Court to compel Plaintiff to order the additional parts of the transcript.

Plaintiff fails to cite any authority that supports its position that the Defendant should bear the costs of the portions of the transcript it designates as necessary to consideration on appeal. Plaintiff's reliance on *Mandel v. Max-France, Inc.*, 704 F.2d 1205 (11th Cir. 1983), is misplaced. In *Mandel*, the court merely reiterated the appellee's responsibility for designating any parts of the record necessary for review on appeal but not initially ordered by the appellant. *Id.* at 1206-07. Plaintiff attempts to construe the court's

admonition that the appellee shares in the burden of ensuring the adequacy of the record on appeal to mean that the appellee must pay for the parts it designates as necessary. The *Mandel* case does not support this contention.

Plaintiff further contends that Defendant does not really need many of the parts of the transcript it included in its designation. Plaintiff contends that Defendant merely seeks to burden Plaintiff with additional costs. In making these accusations, Plaintiff misrepresents the items included in the Defendant's designation. For example, Plaintiff suggests that Defendant seeks the transcript of "the entire voir dire." Defendant, however, only designated the voir dire of two prospective jurors. A review of Defendant's designation indicates that Defendant has carefully limited the items to those which relate to issues likely to be presented on appeal. There is no indication that any items were included in bad faith or in an attempt to financially burden the Plaintiff. In light of the fact that Plaintiff failed to provide a statement of the issues to be presented on appeal as required under Rule 10(b)(3), Plaintiff is fortunate to be responsible for anything less than a complete transcript.

For the foregoing reasons, the Court GRANTS Defendant's Motion to Compel Plaintiff to Order Additional Portions of Trial Transcript (Doc. No. 66). Plaintiff is instructed to order the parts of the transcript designated by Defendant in its Designation of Additional Portions of Trial Transcript for Plaintiff-Appellant to Order (Doc. No. 64).

3. Plaintiff's Motion for Judicial Reassignment and Memorandum in Support thereof (Doc. Nos. 69 and 70, filed January 24, 1991) and Defendant's Brief in Opposition to Motion for Judicial Reassignment (Doc. No. 74, filed February 5, 1991).

Plaintiff's Motion for Judicial Reassignment (Doc. No. 69) is DENIED.

DONE AND ORDERED at Orlando, Florida, this 5th day of March, 1991.

/s/ Patricia C. Fawsett

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record.

EXHIBIT C — EXCERPTS FROM TRIAL TRANSCRIPT

(Transcript of September 6, 1990, pp. 3-4)

THE COURT: The Plaintiff has asserted claims under Title 7 of the Civil Rights Act, United States Code Section 2,000-E and 42 United States Code Section 1981. I agree that in this circuit there is no right to a jury trial for Plaintiff under Title 7 and while there is a right to a jury trial on the issues in the Section 1981 claim, it appears that the 1981 claim here may fail in light of the recent decision of the Supreme Court in Patterson versus McGleen.

However, the Supreme Court did not directly state that a claim of discriminatory discharge would fall outside the scope of Section 1981, while the 5th, 6th and 9th Circuits, as well as Federal District Court's have so held. The 8th Circuit opinion is acknowledged by this Court and it agrees with this view and has held that a racially discriminatory discharge continues to be actionable under 1981.

The 11th Circuit has not addressed the precise question, although it has held that Section 1981 does not provide remedy for an employee who is injured by his former employer's efforts to persuade his new employer to fire him in retaliation for the employee's filing an EEOC complaint against the former employer, in the decision at 91 Federal 2nd 1527, and although the Defendant was not accused of discriminatory discharge, the 11th Circuit recognized in Patterson or in that case, that the Patterson decision is significantly narrow to reach Section 1981 in the context of employment discrimination suits and interpreted Patterson as holding that suits based on post-contractual events cannot be brought under Section 1981.

It is, therefore, likely that the 11th Circuit will adopt the view that, in light of Patterson, a discriminatory discharge claim is not actionable under Section 1981, at least where there is no reasonable

way to construe the discharge as a repeal to entering into a new contract with the Plaintiff, which appears to be the situation that's alleged in this case.

However, it appears to me that since the jury has been called, since this motion was not filed until August 20, 1990, after this case had long been noticed for trial, that the Court should reserve ruling on the motion.

(WHEREUPON, the excerpt was concluded.)

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(Transcript of September 6, 1990, pp. 5-6)

THE COURT: All right, does the Plaintiff have any challenges for cause or just state the names of anyone.

MR. KAIMOWITZ: No, I have none.

THE COURT: Does the Defendant?

MR. KNEISEL: Yes, ma'am. Mr. Johnson is the gentleman in the case—

MR. KAIMOWITZ: I'm sorry?

MR. KNEISEL: Mr. Johnson is the gentleman in the case—

THE COURT: Are you going to object? I realize that is supposition. Can he be a silent juror?

MR. KAIMOWITZ: I'm trying like heck, unnecessarily, to avoid an all white jury because—

avoid an all white jury because—

THE COURT: But observing his demeanor, I don't think there's any way he could be fair and objective in this case. I'll grant the challenge for cause as to Mr. Johnson. That's number 88, Edward Johnson.

* * * * *

THE COURT: The Plaintiff challenges juror 30, Joseph Chmelir. Into his seat will go juror 191, Harold D. Wray. Does the Defendant wish to exercise a challenge?

MR. KNEISEL: Yes, ma'am. Mr. Graham, number 66.

THE COURT: All right. Juror number 66—

MR. KAIMOWITZ: I'm sorry, which is that?

THE COURT: Joe A. Graham, juror number 66.

MR. KAIMOWITZ: I'm going to make an objection to preserve the record, that blacks have been excluded from the jury—

THE COURT: Mr. Kneisel, you need to state your grounds.

MR. KNEISEL: Yes, ma'am. The fact that her sister had sued Frito-Lay. I can assure you the fact that she's black is not a factor. She did exercise some supervisory authority in the present position and has terminated employees, but the fact that the sister previously sued Frito-Lay arising out of a dispute and the fact that the Plaintiff has several witnesses on his list, including several who have filed worker's compensation cases and have been involved in similar accidents in Frito-Lay have, perhaps, subconsciously

THE COURT: All right. I'll allow the Defendant to exercise the challenge. Number 66, Joe A. Graham, will be the peremptory challenge and into his seat will go 186. Marilyn Whiddon.

* * * * *

EXCERPT FROM JURY INSTRUCTIONS

(Transcript of September 12, 1990, p. 2)

Defendant denies that it discharged plaintiff because of his race. Defendant contends that the plaintiff was discharged because he violated work rules that prohibit employees from leaving the plant premises without first clocking out and falsification of a time card.

The burden of proving that the decision was racially discriminatory remains upon plaintiff throughout the case. The defendant does not have to prove that the employment decision in issue was not racially biased.

In addition, when the defendant offers evidence to show that its termination decision was based upon a reasonable non-discriminatory factor or factors, the plaintiff has the burden of negating such evidence by proving that such factor or factors was a mere pretext or false excuse for illegal race discrimination.

* * * * *

EXHIBIT D — POSTED MEMORANDUM (DEFENDANT'S TRIAL EXHIBIT 3)

FRITO-LAY, INC.

TO: All Employees

FROM: Al Carballosa

DATE: March 11, 1985

SUBJECT: Leaving the Plant While "On The Clock"

In keeping with our promise to clarify policies for our new and long-service employees, the following will be another in a series of policy clarifications.

Even though it may, at times, seem easy to go out to lunch; or go out of the Plant and forget to punch out, keep in mind that this is a very serious Plant rule violation, and could lead to disciplinary action up to and including termination. Our Handbook Section28 states:

> "The following actions are prohibited and may result in disciplinary action up to and including discharge depending on the severity.
>
> - Leaving the plant or work station during working hours without permission, and clocking out."

Any employee who does leave the Plant while on the clock may be seen as having abandoned their job, and in this situation, termination may be real consequence.

Please see your supervisor if you have any questions.

Al Carballosa

AC/sg